TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 542.

STEPHEN E. JONES, ASSIGNEE IN BANKRUPTCY OF W. H. WALKER & CO., APPELLANT,

vs.

FRED K. WALKER, MARY D. WALKER, AND JAMES E. BREED, EXECUTORS OF W. H. WALKER, DECEASED, ET AL.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED OCTOBER 3, 1879.

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1 Proceedings of the circuit court of the United States for the district of Kentucky at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 17th, 1879. Present, the Hon. John Baxter, circuit judge of the United States for the sixth circuit.

STEPHEN E. JONES, ASSIGNEE OF W. H. Walker & Co., complainant,
vs.
FRED. K. WALKER, MARY D. WALKER, & James E. Breed, executors of W. H. Walker, deceased; Fred. K. Walker, Mary D. Walker, James E Breed, Lizzie W. Breed, Frank Walker, Geo. Walker, Walter Walker, Irving Walker, Clay Walker, and Mary Walker, defendants.

Be it remembered that heretofore, to wit, on Monday, February 14th, 1878, came the complainants, by their counsel, and filed in this court a certified copy of the order of the district court and the original papers in this cause.

2 The order of the district court is as follows, to wit:

Order.

District court of the United States for the district of Kentucky.

S. E. JONES, ASSIGNEE, &C.,
vs.
F. K. WALKER ET AL.

It appearing to the district court of the United States for the district of Kentucky that the judge thereof is interested in the above-styled suit pending therein, which renders it improper in the opinion of the judge of said court for him to sit on the trial thereof, on motion of complainant, it is ordered that said fact be entered on the record of the court, which is done. It is further ordered that an authenticated copy of this order, with all the proceedings in the said suit, be forthwith certified to the circuit court of the United States for the district of Kentucky.

Witness my signature and the seal of said court, at Louisville, this 14th day of October, A. D. 1878.

A true copy.

[L. S.]

AUSTIN BALLARD, *Clk*,
By ROB'T H. BRENT, *D. C.*

The bill of complaint filed Dec. 12th, 1877, is as follows, to wit:

3 *Bill of complaint.*

In the circuit court of the United States, sixth circuit Kentucky district.

To the judges of the circuit court of the United States for the district of Kentucky:

Stephen E. Jones, of Louisville, and a citizen of the State of Ken-

tucky, brings this his bill against Fred. K. Walker, Mary D. Walker, and James E. Breed, executors of the estate of W. H. Walker, deceased, Fred. K. Walker, Mary D. Walker, and James E. Breed, Lizzie W. Breed, Frank Walker, George Walker, Walter Walker, Irving Walker, Clay Walker, Mary Walker, the said defendants, being citizens of the State of Kentucky, and thereupon your orator complains and says:

That heretofore, to wit, on the 27th day of February, 1877, the defendants, composing the firm of W. H. Walker & Co., to wit, Fred. K. Walker, and Fred. K. Walker, Mary D. Walker, and James E Breed, executors of the estate of W. H. Walker, deceased, filed their voluntary petition in bankruptcy in the district court of the United States for the Kentucky district at Louisville, praying to be adjudged bankrupts, and in said case such proceedings were had that on February 28th, 1877,

4 an order of adjudication was duly entered by said court, adjudging that said Fred. K. Walker and said firm of W. H. Walker & Co. were bankrupts. And in said cause such further proceedings were had that the complainant was, on March 27th, 1877, duly elected and appointed by said court as assignee in bankruptcy of said bankrupts, and he duly qualified as such, and is still such assignee. And thereafter, on the day of , 1877, John H. Ward, register in bankruptcy of said court, by his deed of conveyance, which was duly executed and recorded, conveyed to complainant all the assets, estate, and interests of every kind of said bankrupts, duly certified, copies of the said order adjudication, the said appointment of complainant as assignee, and the said deed of said register are herewith filed as parts hereof, marked A, B, and C.

Complainant charges that, as such assignee, he is the owner, and is entitled to the possession of all the assets of said bankrupts, and is entitled to have an account and settlement with the defendants, the said Fred. K. Walker, Mary D. Walker, and James E. Breed, of the said

5 partnership of W. H. Walker & Co., and to have the assets of said firm paid into court, and to have the liabilities of said firm ascertained and paid, and is entitled to have the said defendants, as partners in said late firm, contribute and pay the proportion due by them of the debts of said firm, and he is entitled to recover from the defendants any and all sums due by them, the said firm, and any and all sums wrongfully received or withdrawn from said firm, assets of W. H. Walker & Co., and to have the same applied to the payment of the debts of said firm, and the balance of said assets, if any, distributed according to law. He states that the said firm of W. H. Walker & Co. was founded many years ago, and was conducted for many years under said firm-name of W. H. Walker & Co., and was composed of said W. H. Walker, deceased, and the defendant, Fred. K. Walker, and the said firm so continued in business as a wholesale liquor store in Louisville, Kentucky, and as a commercial firm, up to the death of said W. H. Walker, which occurred on the day of May, 1872; and the said firm

6 of W. H. Walker & Co. continued in operation after the death of said W. H. Walker & Co., as before his death, with no change in the name or style thereof, and with no other change therein except as herein set forth, and so continued in operation until the time of said adjudication in bankruptcy, whereby the same was dissolved.

The said W. H. Walker left at his death a last will and testament which was duly admitted to probate by and duly recorded in the Jefferson County court, and a duly certified copy of which is herewith filed as part hereof, marked D. By the said will the defendants, Mary D.

Walker (wife of said decedent), Fred. K. Walker (son of said decedent), and James E. Breed (son-in-law of said decedent), were appointed, and they duly qualified, as his executors.

The said W. H. Walker left at the time of his death surviving him eight children, to wit, the said Fred. K. Walker, Lizzie E. Breed, wife of said James E. Breed, Frank Walker, George Walker, Walter Walker, Irving Walker, Clay Walker, and Mary Walker, the last-named four being infants under the age of twenty one, and of whom the said
7 Mary D. Walker, their mother, has duly qualified as guardian; and the said children, together with said executors and Elizabeth Cooke, the mother of said decedent, and Walker Kennedy, the nephew of said decedent, were the only devisees of said decedent and were his only heirs.

By the terms of said Walker's will said firm was to continue after the death of said Walker without change or intermission in said name of W. H. Walker & Co., and said Walker's estate was to remain a partner therein, and the said firm was to be conducted, in behalf of said Walker's estate (which was the owner of much more than half the assets thereof), by and through the said executors, one of whom was the other partner therein, the said Fred. K. Walker, and the said provision was made by the consent and by agreement with said Fred K. Walker.

The said firm was continued after the death of said Walker without change or intermission in its business by the said executors for and in behalf of said Walker's estate, and by said Fred. K. Walker, and the said executors and said Fred. K. Walker claimed and held the
8 assets thereof, and shared liability for the losses thereof, and claimed and divided the profits thereof among themselves as partners up to the time of said bankruptcy; and the said estate of W. H. Walker was held out and represented by said partners to be and was known to be a partner in said firm and liable for the debts of said firm and a sharer of the profits thereof, and the said executors, for and in behalf of said firm and of said Walker's estate, sought and obtained credit for said firm by such representations, and the present creditors of said firm dealt with said firm, relying on said representations, and relying on the financial ability of said Walker's estate for the security of and payment of the debts contracted by said firm.

The said W. H. Walker & Co., after the death of said Walker, was unsuccessful in business and incurred large debts, the amount thereof being at the time of said bankruptcy more than the sum of one hundred and seventy-five thousand dollars, and being far more than the entire capital stock of said firm, for which the said executors, for and in
9 behalf of said estate of W. H. Walker and the said estate are liable jointly with the said Fred. K. Walker and to the extent of the interest and proportion of said estate in the said firm are liable to contribute with said Fred. K. Walker's estate; each of said estates and all *of* each of them being liable for all of said debts as partners in said firm. There have been proven in the bankruptcy proceedings aforesaid against said firm debts to the said amount of exceeding $175,000, and the firm assets which have come into the hands of complainant as such assignee and the assets of said Fred. K. Walker have only been sufficient to pay a pro rata of thirteen per centum on said debts, and the residue are still claimed against complainant. The said bankruptcy proceedings and the said proofs of debts are hereby referred to as parts hereof.

The said W. H. Walker left at the time of his death a large estate, both real and personal, which by the terms of said will came into the

hands of said executors as to the greater portions thereof, and a portion of which is still in the hands of said executors, and the residue of which said executors have delivered and paid over to the said
10 devisees. The amount of the said testator's property still in the hands of said executors is very large and valuable, and is sufficient to pay all or a great portion of the debts of said firm. He calls on said executors to state how much and what assets they received of said decedent's estate and what disposition they have made thereof, or of any part thereof, and what assets of said decedent they now hold, that the same may be subjected and applied as hereinafter prayed for.

2nd. Complainant further states that if for any reason the said James E. Breed, Mary D. Walker, and Fred. K. Walker were not authorized to be partners in said firm as executors of said decedent, and were not authorized by their said representations and actions hereinbefore set forth, to bind the estate and assets of said decedent, as a partner in said firm, for the payment of its debts, then the said Fred. K. Walker, and Mary D. Walker, and James E. Breed, by reason of the facts hereinbefore set forth, became bound and are liable for said debts of said firm personally as partners in said firm. The said James E.
11 Breed, Mary D. Walker, and Fred. K. Walker claimed and owned an interest in said firm and its assets, both as executors and individually, and shared the losses and divided the profits thereof, and managed and controlled the same, all of which was known to the creditors of said firm aforesaid, and the said defendants are estopped as against the creditors of said firm, and as against complainant, to deny that they were and are partners in said firm, and, as such, liable and bound to contribute to the payment of its debts aforesaid.

3d. Complainant further states that the interest of said W. H. Walker in said firm of W. H. Walker & Co. at the time of his death amounted to and was of the value of $82,774 $\frac{59}{100}$ (eighty-two thousand seven hundred and seventy-four and $\frac{59}{100}$ dollars), which said interest and value was, by the terms of said will of said Walker, to be continued therein, and to be chargeable with the debts of said firm, thereafter to be incurred, and was not to be drawn out of said firm by said executors or devisees, or by any one. The profits of said firm only were to be drawn from the same, and to be received by said executors and devisees un-
12 der the terms of said will, and the said will charged the capital of said firm with the payment of its debts, and prohibited any portion of said capital from being drawn out until said firm should be discontinued and its debts all be paid.

Complainant says that the said firm of W. H. Walker & Co. made no profits whatever from and after the death of W. H. Walker, and there were no profits for defendants to draw out of said firm, and the defendants should not have drawn any sum out of said firm; but, notwithstanding this, and notwithstanding there were large amounts of indebtedness due by said firm, and portions of which is still owing, and has been proved against said firm and against complainant in bankruptcy, as aforesaid, and for the payment of which said Walker's share of said firm capital was charged by his will, and by law, as aforesaid, the said executors wrongfully and under the false claim that the same were profits, withdrew from said firm and from its capital, large sums of money, for and in the name of W. H. Walker's estate, and used and appropriated the same to their own use and to the use of the devisees afore-
13 said of W. H. Walker. The said sums so drawn out of said capital by defendants, and paid to and received by the defendants, were as follows, to wit:

As the share of W. H. Walker's estate in the pretended profits of the year 1872 (to wit, two-thirds)	$12,646 96
As the share of W. H. Walker's estate in the pretended profits of the year 1873 (to wit, one half)	18,463 95
As the share of W. H. Walker's estate in the pretended profits of the year 1874 (one-half)	7,997 71
As part of the share of pretended profits to W. H. Walker's estate for the year 1875 (one-half)	693 25
As part of the share of W. H. Walker's estate in the pretended profits of the year 1876, and up to Feb'y 7th, 1877, the date of the bankruptcy	2,754 20
The total sums so drawn out amounting to	$42,556 07

None of said sums were, in reality, drawn from profits of said firm, but from its capital.

The said Fred. K. Walker also drew out of said capital, as his share as partner of said pretended profits, the following sums during said period:

During the year 1872 (¼ share)	$9,184 76
During the year 1873 (¼ share)	$13,596 67
During the year 1874 (¼ share)	10,488 13
During the year 1875 (¼ share)	9,825 81
During the year 1876, and up to Feb'y 7th, 1877 (¼ share)	17,380 91
Making in all drawn out by F. K. Walker	$60,376 28

Complainant further states that by the terms of said will of W. H. Walker, deceased, it was also provided that the defendant, Fred. K. Walker, might purchase, at a fair valuation and upon reasonable time, such portion of said decedent's share aforesaid in said firm-capital and good will as would make said Fred. K. Walker's share and interest in said firm equal to one-half, and would make said Fred. K. Walker a full partner therein; and it was further provided that when said Fred. K. Walker should pay for said interest and share so purchased, the sum so paid therefor by him might be divided and withdrawn by said executors Fred. K. Walker was, at the and devisees, as profits of said firm were to be withdrawn. The said death of said W. H. Walker, the owner of a one-third interest only in said firm. On January 1st, 1873, said Fred. K. Walker made a contract for the purchase of an additional one-sixth interest therein, so as to make him a full partner therein, at the price of $20,295.70, which was the reasonable value thereof, but said
15 Fred. K. Walker did not pay for the same in a reasonable time, at any time, and has never paid for the same. But the said executors, notwithstanding said Fred. K. Walker paid nothing into said firm, thereupon withdrew out of the capital of said firm aforesaid the sum of $20,295.70, which they paid over to and divided among said defendants, the devisees of W. H. Walker.

Complainant further states that the said executors on the first day of January, 1875, without right and contrary to the said provisions of said will, withdrew from said W. H. Walker's interest in the capital of said firm the further sum of fourteen thousand four hundred and twenty-five dollars, which said sum was not profits of said firm, and which sum was paid over to and divided among the said defendants, the devisees of W.

H. Walker, whereby said Walker's interest in the capital of said firm was reduced said further sum of $14,425.00.

Complainant states that each and all of said sums so wrongfully and unlawfully withdrawn from said firm and converted to the use of defendants, and amounting in all as to the said estate of W. H.
16 Walker's interest therein to the sum of $77,276$\frac{77}{100}$, were so drawn out and received and converted to the use of defendants, with full knowledge and notice on their part of the terms of said will of W. H. Walker, deceased, and with full notice that the same were not profits, and that the said sums were withdrawn from the capital of said firm; and by the said withdrawals of said sums the said capital of said firm and the said interest of W. H. Walker's estate therein, charged as aforesaid with the payment of said firm's debts, was diminished, and the creditors of said firm were deprived thereof, and the said firm was reduced to bankruptcy.

Complainant does not know the amount of the sums so received by each of said devisees, defendants, and he calls on said defendants to answer and set forth the amounts so received by each of them respectively. He charges that said sums were received without any consideration paid, and without right, and that he is entitled to recover of said executors who withdrew said sums, and of said devisees who received them, the said sums, and to have the same applied to the
17 payment of the debts of said firm.

Wherefore the complainant prays that this court will grant to the complainant its process of subpœna against the defendants, Mary D. Walker, James E. Breed, and Fred. K. Walker, as executors of W. H. Walker, deceased, and Mary D. Walker, James E. Breed, Fred. K. Walker, Lizzie W. Breed, Frank Walker, George Walker, Walter Walker, Irving Walker, Clay Walker, and Mary Walker, the last named four of whom are infants under the age of twenty-one years, and against Mary D. Walker as guardian of said infants, commanding them to appear and answer the premises; and upon final hearing that the accounts of the firm of W. H. Walker & Co. be settled, and said firm be wound up by the court, and that its assets be collected and its debts paid; that the said Mary D. Walker, James E. Breed, and Fred. K. Walker be adjudged partners in said firm and liable for its debts, and that the assets of the said W. H. Walker, deceased, in the hands of Mary D. Walker, James E. Breed, and Fred. K. Walker, as executors of said estate of W. H. Walker, deceased, and in the hands of defendants, the devi-
18 sees of W. H. Walker, deceased, be decreed liable for said debts and be subjected thereto, and that said executors and devisees be compelled to pay to complainant, or into court herein, the said sums so wrongfully withdrawn and received by them, and that the sums so realized be applied to the payment of the debts of said firm, and that defendants be compelled to contribute to the payment of said debts as partners as aforesaid, and he prays for all general relief.

BYUR & DAVIE,
W. O. & J. L. DODD,
GEORGE WEISSINGER,
Solicitors for Complainant.

Filed December 12th, 1877.

Upon which there issued the following subpœna in chancery, to wit:

19 The President of the United States of America to Mary D. Walker, James E. Breed, & Fred. K. Walker, as ex'ors of W. H. Walker, dec'd, Mary D. Walker, James E. Breed, Fred. K. Walker, Lizzie W. Breed, Frank Walker, Geo. Walker, Walter Walker, Irving Walker, Clay Walker, Mary Walker, and Mary D. Walker, guardian, greeting:

You are commanded that you and each of you be and appear before our district court of the United States of America for the district of Kentucky, at the federal court hall, in the city of Louisville, on the fourth Monday in December next, to answer a bill in equity, exhibited in said court, under the jurisdiction conferred upon it by the bankrupt laws of the United States, by Stephen E. Jones, assignee of W. H. Walker & Co., bankrupts, which you shall in nowise omit, under the penalty of the law. And you are hereby warned that unless you answer, plead, or demur to the aforesaid bill within ten days after the service thereof, if it be made in Jefferson County, or in fifteen days thereafter, if the service be made elsewhere in the district, the said bill may be taken for confessed, or you may be proceeded against for contempt.

Witness the Hon. Bland Ballard, judge of the district court of the United States for the district of Kentucky, and the seal of our said court, at the city of Louisville, this 13 day of December, A. D. 1877, and of our Independence the 102nd.

[L. S.]

AUSTIN BALLARD,
C. D. C. K. D.,
By ROBT. H. BRENT,
His Deputy.

Upon which the marshal made the following return, viz:

Executed Dec. 13, '77, by delivering a copy *of* the within named Mary D. Walker, Jas. E. Breed, Fred. K. Walker, ex'ors of W. H. Walker, dec'd, Mary D. Walker, Jas. E. Breed, Fred. K. Walker, Lizzie W. Breed, Frank Walker, Walter Walker, Irving Walker, Clay Walker, Mary Walker, and Mary D. Walker, guardian.

R. H. CRITTENDEN, *U. S. M.*,
By HENRY CRITTENDEN, *D. M.*

Ex. on Geo. Walker, Dec. 19th, 1877.

R. H. CRITTENDEN, *U. S. M.*,
By J. B. McKINLEY, *Sp. Dep'ty.*

Exhibit A, filed with bill of complaint, is as follows, viz:

20 EXHIBIT A.

Adjudication of bankruptcy upon debtor's petition.

In the district court of the United States for the district of Kentucky.

In the matter of W. H. Walker & Co., in bankruptcy, by whom a petition for adjudication was filed on the 28th day of February, A. D. 1877, in said court, at Louisville, in said district, on the 28th day of February, A. D. 1877, before J. H. Ward, one of the registers of said court of bankruptcy:

I, the undersigned, a register of said court in bankruptcy, upon good

proof before me this day taken, do find that the said W. H. Walker & Co., Frederick K. Walker, and the estate of W. H. Walker, to the extent invested in the firm of W. H. Walker & Co., as limited and defined by his last will, has become a bankrupt within the true intent and meaning of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2d, 1867, and I do hereby declare and adjudge him a bankrupt accordingly.

[SEAL.] J. H. WARD,
Register in Bankruptcy.

A true copy—Att:

AUSTIN BALLARD, *Clk*,
By ROBT. H. BRENT, *D. C.*

Exhibit B is as follows, to wit:

21 EXHIBIT B.

(Form No. 11.)

Certified memorandum of first meeting of creditors.

In the district court of the United States for the district of Kentucky.
In bankruptcy.

In the matter of W. H. Walker & Co., bankrupt, at Louisville, in said district, on the 27th day of March, A. D. 1877, before J. H. Ward, register in bankruptcy.

DISTRICT OF KENTUCKY, *ss:*

MEMORANDUM.—This being the day appointed by the court for the first meeting of creditors under the said bankruptcy, whereof the notice required in that behalf has been duly given, I, the undersigned, register of the said court in bankruptcy, sat at the time and place above mentioned, pursuant to such notice, to take proof of debts, and for the choice of assignee under the said bankruptcy; and I do hereby certify that the greater part in number and in value of the creditors who have proved their debts were present or duly represented. S. E. Jones received the votes of the creditors who have proved debts, and was elected assignee; Jas. A. Leech, Edward Fulton, & T. H. Sherley appointed committee, under whose direction said assignee is to act and with whom he is to agree as to compensation; and said assignee is to test in the courts the question of the extent and nature of the liability of the estate of W. H. Walker, deceased, for the debts of W. H. Walker & Co.

J. H. WARD,
Register in Bankruptcy.

Filed March 27th, 1877.

Exhibit C referred to is as follows, viz:

22 EXHIBIT C.

(Form No. 18.)

Assignment of bankrupt's effects.

In the district court of the United States for the district of Kentucky.
Bankruptcy. 4711.

In the matter of W. H. Walker & Co. & Frederick K. Walker, & the estate of W. H. Walker to the extent invested in the firm of W. H. Walker & Co., as limited and defined by his last will.

DISTRICT OF KENTUCKY, *ss:*

Know all men by these presents, that S. E. Jones, of the city of Louisville, in the county of Jefferson and State of Kentucky, in said district, has been duly appointed assignee in said matter.

Now, therefore, I, J. H. Ward, register in bankruptcy, by virtue of the authority vested in me by the 14th section of the act of Congress entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, do hereby convey and assign to the said S. E. Jones, assignee as aforesaid, all the estate, real and personal, of the said W. H. Walker & Co., Frederick K. Walker, and the estate of W. H. Walker, dec'd, as stated above, bankrupt aforesaid, including all the property, of whatever kind, of which they were possessed, or in which they were interested or entitled to have, on the 28th day of February, A. D. 1877, with all their deeds, books, and papers relating thereto, excepting such property as is exempted from the operation of this assignment by the provisions of said fourteenth section of said act.

To have and to hold all the foregoing premises to the said S. E. Jones, assignee, and his heirs forever, in trust nevertheless for the use and purposes, with the powers and subject to the conditions and limitations set forth in said act.

In witness whereof I, the said J. H. Ward, register, have hereunto set my hand and caused the seal of said court to be affixed this 27th day of March, A. D. 1877.

J. H. WARD,
Register.

Exhibit D above referred to is as follows:

23 EXHIBIT D.

I, William H. Walker, do publish and declare this to be my last will and testament, hereby revoking all others. After payment of my just debts, funeral expenses, and all costs and charges of administration, I give, devise, and bequeath my property as follows:

1. If my mother, Elizabeth Cook, now eighty-two years old, survives me, my executors are to take care of her, and see that she has all she needs, and is well provided for during her life, and that she has a comfortable home.

2. I give and bequeath to my wife absolutely all the household, parlor, & kitchen furniture contained in my dwelling, with all decora-

tions, ornaments, paintings, engravings, pictures, books, & other articles contained in my dwelling or on the premises; also carriage & horses, if any there be. I also give, devise, and bequeath to her in all my other property what she would have taken in case of my intestacy, except that devised to Walker Kennedy, that is to say, one-third of my realty, except that devised to Walker Kennedy, for and during her natural life, & one-third of my personalty absolutely. I wish each of my minor children, so long as he or she continues unmarried and under age,
24 to remain and occupy my dwelling under the control of and with my wife so long as they are dutiful and respectful to her, until the final division of my property, they paying a fair board to her, and she being charged an annually agreed rent, to be fixed at and from the first of January of each year, of which one-third is to be abated as her interest in said dwelling as above. But it is distinctly understood that keeping up the dwelling is at the option of my wife, & she may decline to do so, or may give it up when she will.

3. I devise and bequeath to my nephew and namesake, Walker Kennedy, two hundred and sixty-five acres of land in Young County, Texas, Leckie's survey No. 1993, recorded in patent book No. 1, page 160.

4. I give, devise, and bequeath all the rest, remainder, and residue of my property to my children living at my death, share and share alike, to be divided among them, the personalty at my death and the realty when the youngest of them living to be twenty-one years of age arrives at that age, except my interest in the capital and good will of the business of W. H. Walker & Co. Should
25 any of my children die during my lifetime, leaving husband, wife, or descendants, such husband, wife, or descendants shall have and take such share of my property as woulld have been taken by them had my child outlived me and died intestate, seized and possessed of his or her share given to my children, living at my death; but if such child, being of age, leaves a will, its provisions shall control said share. The portion of my daughters I give in trust to my executors for their sole and separate use, free from the marital rights of any husband, & power is given to my executors to invest and manage the personalty, & to sell and convey the realty and reinvest the proceeds whenever, however, and as often as said trustees may deem best, but always to the sole & separate use of my daughters, as above. Should any of my minor children surviving me die before reaching the age of twenty-one years, his or her share shall go as if he or she had hereafter died intestate in my lifetime; should I make advancements to any of my children hereafter, I will take his or her note for the same, & he or she shall be charged in the division of my property with so much,
26 without interest; unless such notes are taken, there is to be no charge for such advances.

5th. My executors shall have power to sell and convey any of my real estate, when, in their judgment, it would be to the advantage of my estate to do so, and the proceeds shall then be divided or applied according to this will; but they shall not sell my dwelling without the consent of my wife, nor my storehouse, where the business of W. H. Walker & Co. is carried on, if occupied by that concern, without the consent of my son Frederick. Till the time appointed for the final division of my property, they shall have power to collect rents, make repairs, effect insurance, and generally to control and manage my realty, its sale or division, with all expense; each devisee shall be charged in proportion to the then extent of his or her interest.

6. As it is my desire that my sons should qualify themselves to earn their own livelihood and be useful members of society, I wish them each to have as they become of age, if he then has it not from my property, the rents, profits, avails, or proceeds, from three to five thousand dollars in cash, the amount to be fixed by my executors & to be
27 charged to him without interest on the final division of my property.

7. I appoint my wife guardian of my minor children, & request that no surety be required of her.

8. It is my wish that my son Frederick carry on the buisiness of W. H. Walker & Co. in that name and style, & in my storehouse where it is now carried on, giving him power to change the place until my youngest child living to be twenty one years of age arrives at that age, or for a shorter time, if he does not find it profitable. To that end all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable while Frederick carries on said buisiness; my share shall pay the salary of an efficient man to aid him therein, or he shall have compensation for his services as to and from my share. Agents and employees of the concern are to be paid by it. Frederick is not to be charged with five thousand dollars advanced by me to him on his coming of age, & he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in
28 said concern & its good will as will make his share equal to one-half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained & declared in the first of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants, and others. As my personalty is to be divided among them when my youngest child living to be twenty-one years of age arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the buisiness, my interest in the concern and its good will shall be sold as my executors may direct, and the proceeds divided, as the profits thereof are to be divided, with an obligation, if possible, that the buisiness may be carried on under the old name and style.

9. To save any misconstruction as to the investment & management of the portion of my daughter, I declare it to be my will that they & their families, if any, are to have a comfortable, proper, & indulgent support to the extent my executors may sanction, to be realized
29 as far as may be from the interest, profits, dividends, rents, and avails of such portion.

10. When my youngest child living to be twenty one years of age arrives at that age, or at the death of my wife before that time, my realty then undivided shall be divided among my children, their descendants, & others according to the directions given for dividing my property among them, except my store house shall remain to the concern of W. H. Walker & Co., if occupied by it till my youngest child living to be twenty-one years of age arrives at that age, and it shall then, or when it ceases to be occupied by the concern, or when the concern is discontinued, be divided as above. I appoint my wife, my son Frederick, and my son-in-law James E. Breed executors of this will, and request that no surety be required of them in the administration. A majority of them shall control in all their duties under this will should one or more not qualify; whichever does, and the survivors or survivor of them, shall have all the powers conferred by this will as if named alone for that duty.

In testimony whereof I have hereunto set my hand this fifth
30 day of July, in the year of our Lord one thousand eight hundred and seventy, and acknowledged the same and published this will in the presence of the witnesses named below, and they have attested the same at my request in my presence and in the presence of each other, the words "of his or her share" and "pers'alty" being first erased and personalty interlined by the draftsman.

W. H. WALKER.

Witnesses:
PATRICK JOYES.
E. S. WORTHINGTON.

STATE OF KENTUCKY:

At a county court held for Jefferson County, at the court-house in the city of Louisville, on the 13th day of May, 1872, the foregoing instrument of writing, purporting to be the last will and testament of W. H. Walker, dec'd, late of this county, was produced in court & proven by the oath of Patrick Joyes, one of the subscribing witnesses thereto, who also proved the attestation of E. S. Worthington, the other subscribing witness thereto, whereupon the same was established by the court to be the last will & testament of said Wm. H. Walker, dec'd, & ordered to be recorded and is recorded in my office as clerk of said court, the probate thereof being duly stamped as required by act of Congress.

Att:

CH. M. THRUSTON, *C'k.*

Answer of James E. Breed & Mary D. Walker is as follows, viz:

31 *Answer of Jas. E. Breed & Mary D. Walker.*

In the district court of the U. S. for the district of Kentucky.

The answer of James E. Breed and Mary D. Walker, two of the executors of W. H. Walker, dec'd, defendants, to the bill of complaint of Stephen E. Jones, assignee of W. H. Walker & Co., complainant.

These defendants, James E. Breed and Mary D. Walker, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, these defendants answering say and each of them says:

That it is not true, and they deny the fact to be, that on the 27th day of February, 1877, or at any other time, these defendants, either as individuals or in any trust or fiducial capacity, or as executors of W. H. Walker, deceased, did jointly or as partners compose or form part of or were at any time partners in the firm of W. H. Walker & Co.,
32 and they deny that either of them at any time whatever was such partner, or ever held out himself or herself as a partner in said firm. They deny that they or either of them as partners in the firm of W. H. Walker & Co., or in any other capacity whatever, did, on the 27th February, 1877, or at any other day whatever, file or unite in the filing of any voluntary petition or other proceeding in bankruptcy in the district court of the United States for the Kentucky district, or for any district whatever, at Louisville, or elsewhere, praying or consenting to

be adjudged bankrupts, or praying that the firm of W. H. Walker & Co. be adjudged bankrupts. They charge that complainant's allegations in said regard are wholly incorrect and are contradicted by the very proceeding and record of this hon. court, under and by virtue of which he claims to be the duly and regularly appointed and qualified assignee in bankruptcy of the firm of W. H. Walker & Co. They charge and aver that the only proceedings in bankruptcy affecting the firm of W. H. Walker & Co. were those originating in and founded upon a certain petition of voluntary bankruptcy, addressed to the honorable judge of this court and filed in this court in bankruptcy, on the 27th day of Feb-
33 ruary, 1877, by Frederick K. Walker, a partner of said firm, and by him signed with the firm name of W. H. Walker & Co., and in and by which it was described and set forth that said petition was the petition of "W. H. Walker & Co., a firm composed of the interest of the estate of W. H. Walker, deceased, as limited and defined by his last will, and Frederick K. Walker;" and further: "That the estate of W. H. Walker, to the extent of interest invested, and under the limitations of the will of W. H. Walker, deceased, recorded in the Jefferson County court, Kentucky, as of date May, 1872, and Frederick K. Walker," were the sole and only partners of said firm. And in no part of any such proceedings or of any proceedings were these defendants held out, charged to be or described as either jointly or separately partners or a partner in said firm of W. H. Walker & Co., nor was the estate of W. H. Walker, dec'd. held out or charged to be a partner save to the extent and under the limitations expressed in the will of said W. H. Walker, deceased. It is not true that upon any petition filed by or united in by these defendants, or either of them, any adjudication
34 was at any time had or entered by this or any court by which the firm of W. H. Walker & Co. was adjudged or declared bankrupt, or any proceedings had resulting in the choice of complainant, or any other person as assignee of said firm in bankruptcy, or in the qualification of any assignee, or in the execution by any register in bankruptcy of any deed of conveyance of the assets of the firm of W. H. Walker & Co. to complainant, or any one else as assignee in bankruptcy. It is true that Frederick K. Walker did, as one of the firm of W. H. Walker & Co., a firm composed of the interest of the estate of W. H. Walker, deceased, as limited and defined by his last will, and said Frederick K. Walker, prepare and file the voluntary petition in bankruptcy of said firm, so constituted and composed, and upon such voluntary petition said firm, so constituted and composed, was in this honorable court adjudged bankrupt, and complainant was chosen and qualified as assignee in bankruptcy of said firm, so constituted and composed, and received a register's deed in bankruptcy conveying to him as assignee in bankruptcy the assets of said firm so constituted and composed for purposes of collection, administration, and lawful distribution.
35 And this, as these defendants charge, was and is the only proceeding in bankruptcy under or by virtue of which complainant has any real or pretended claim or title to the office of assignee of W. H. Walker & Co. or to the possession or administration of its assets, or to any right of action in the premises. They utterly deny that any property or assets of them or of either of them or of the estate of W. H. Walker, deceased (save only such part of W. H. Walker's estate, as by the terms of his will were invested in the partnership of W. H. Walker & Co.), ever did pass to or vest in complainant or that complainant ever at any time became or is the owner or entitled to the possession of all or any part of the assets or estate of either of these defendants or of the

estate of W. H. Walker, deceased. They deny that complainant is entitled to have or demand from them or either of them any account or settlement of the partnership of W. H. Walker & Co., or to have them, or either of them, as partners or otherwise, or on any pretense whatever, contribute or pay any proportion or sum as due or owning by them or either of them to the debts of the late firm of W. H. Walker & Co.

They deny that complainant is entitled to recover from them or
36 either of them, any sum or sums whatever as being due by them or either of them to said firm, or any sum or sums whatever as being by them, or either of them, at any time wrongfully received or withdrawn from said firm assets of W. H. Walker & Co., or to have any sums whatever from these defendants or either of them on any account whatever. They deny and each of them denies that they or either of them owe, or at any time have owed, anything to the firm of W. H. Walker & Co., or to complainant as its assignee. They deny that any sum or proportion is, or at any time has been, due as or on account of the debts of W. H. Walker & Co., or on any other account of the debts of W. H. Walker & Co., or on any other account, by them or either of them to the firm of W. H. Walker & Co., or to any creditor of W. H. Walker & Co., or to complainant as assignee of W. H. Walker & Co. They deny that they, or either of them, have at any time wrongfully received or withdrawn from the firm assets of W. H. Walker & Co. any sum of money or property whatever. It is true that the original firm of W. H. Walker & Co. was founded many years ago, and that its founder, W. H. Walker,
37 made his son, Frederick K. Walker, his partner in said firm. At the time of W. H. Walker's death, in May, 1872, said Frederick K. Walker was a partner to the extent of a one-third interest, the other two-thirds being the property of W. H. Walker. The said partnership was, as these defendants are informed and believe, a general partnership up to the death of W. H. Walker, but they charge that said general partnership was dissolved and terminated on the 2nd May, 1872, by the death of W. H. Walker on that day. In lieu of said general partnership theretofore existing, there was, on said May, 1872, formed a limited liability partnership under the provisions of the will of said W. H. Walker, and more especially in accordance with the 8th clause of his will. By the terms of said 8th clause of his will, W. H. Walker directed as follows:

"It is my wish that my son, Frederick, carry on the business of W. H. Walker & Co., in that name and style, and in my storehouse where it is now carried on, giving him power to change the place until my youngest child living to be twenty-one years of age arrives at that
38 age, or for a shorter time if he does not find it profitable. To that end all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities, but my other property shall not be so chargeable. While Frederick carries on the said business, my share shall pay the salary of an efficient man to aid him therein, or he shall have compensation for his services as to and from my share. Agents and employees of the concern are to be paid by it. Frederick is not to be charged with five thousand dollars advanced by me to him on his coming of age, and he is to have the privilege to purchase at a fair valuation and upon reasonable time such portion of my share in said concern as will make his share equal to one-half. What he may so pay is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared on the first of January after my death, and annually thereafter, shall be di

vided between my wife and children, or their descendants and others, as my personalty is to be divided among them. When my
39 youngest child living to be twenty one years of age arrives at that age, or at the death of my son, Frederick, before that time, or when he discontinues the business, my interest in the concern and its good will shall be sold as my executors shall direct, and the proceeds divided as the profits thereof are to be divided, with an obligation, if possible, that the Business may be carried on under the old name and style."

The said proposed conditions were accepted by Frederick K. Walker, and the business from that time was carried on by him under the provisions of and in accordance with the will of Wm. H. Walker, deceased, he, the said Frederick K. Walker, being the only person charged with the carrying on and management of said business as managing partner. The business so carried on was not a continuation of the old or former partnership, but was a special and limited partnership under the provisions of W. H. Walker's will in lieu and stead of the former general partnership. These defendants did not, nor did either of them, have authority under the will of W. H. Walker to carry on or take part in carrying on the business of W. H.
40 Walker & Co., or to interfere in its conduct or management. They did not, nor did either of them, carry on, or assist in carrying on, said business, directly or indirectly, nor interfere in the conduct or management of it. They had nothing to do with it, but it was solely and entirely under the management and control of Frederick K. Walker. They deny, and each of them denies, that the firm of W. H. Walker & Co. was to continue, or that the estate of W. H. Walker was to remain a partner, or that the firm business or partnership was to be conducted for the benefit of W. H. Walker's estate in any other sense or way or manner than herein is set forth. They deny, and each denies, that the business of said firm was to be conducted by them, or either of them, individually, or in an executorial capacity, or by the executors of W. H. Walker.

It is not true, and these defendants deny the fact to be, that said firm of W. H. Walker & Co. was continued after W. H. Walker's death (without change or intermission in its business) by the executors of said Walker, or any or either of them, for or in behalf of said Walker's estate, in conjunction with Frederick K. Walker, nor is it true (and def'ts deny the fact to be) that the executors aforesaid, or any
41 of them, or either of these defendants, claimed or held (in connection with F. K. Walker) the assets of the firm as partners, or shared liability for any losses thereof as partners, or claimed or divided the profits thereof among themselves as partners up to the time of the bankruptcy. They emphatically deny that the estate of W. H. Walker was by them or either of them, or by any executor, heir, devisee, or legatee of W. H. Walker held out or represented to be, or was ever known to be a partner in said firm except as limited and restricted by his will as aforesaid, or was ever held out or represented to be or known to be liable for the debts of said firm. They deny that they or either of them or the executors of W. H. Walker ever did in behalf of said firm or in behalf of said Walker's estate seek or obtain any credit for said firm by any such representations or by any representations whatever. On the contrary they say and charge that *that* immediately after the qualification of the executors of W. H. Walker, they did submit to counsel the question of the liability of the estate of W. H. Walker for any indebtedness that might thereafter be incurred in the new organi-
42 zation of the firm of W. H. Walker & Co., and further whether

the firm of McFerren, Armstrong & Co., who had been the habitual endorsers of the paper made by W. H. Walker & Co. during the life of W. H. Walker, could continue such endorsements for the firm of W. H. Walker & Co. as so newly organized, and they were then advised, and the fact was communicated to said McFerran, Armstrong & Co., that the estate of W. H. Walker was not liable for the debts of the firm of W. H. Walker & Co. existing after W. H. Walker's death. And upon such advice and information these defendants and each of them have ever since acted as did all those interested or concerned in the estate of W. H. Walker, and the said former endorsers, McFerran, Armstrong & Co., ceased to make any endorsements thereafter. They say that it is wholly untrue that they or either of them, or Frederick K. Walker, or any devisee or legatee of W. H. Walker, ever procured or permitted any statement to be made or repeated, or authorized any report that the business of W. H. Walker & Co. after W. H. Walker's death was continued on its former basis, or that the estate of W. H. Walker was liable as a partner or otherwise for the debts of the
43 concern. They say that immediately after the death of W. H. Walker, and the opening and probate of his will, Frederick K. Walker did after taking advice of counsel give public notice by advertisement in the newspapers of the city of Louisville of the change in the organization of the firm, and that it was and would be carried on by him the said F. K. Walker as surviving partner under the provisions of the will of W. H. Walker, deceased. Said notice was (among other ways) made public by advertisement in the Courier-Journal, the newspaper of largest circulation published in said city, and was widely distributed throughout the said city and the State of Kentucky and the adjoining States. In said newspaper the following advertisement was inserted by F. K. Walker on the 15th May, 1872, viz:

W. H. WALKER & CO.

The business of the above-named firm will be continued and carried on by the undersigned as surviving partner under the name and style of W. H. Walker & Co., under the provisions of the will of W. H. Walker, deceased.

Ever thankful to the old patrons, their continued custom is
44 solicited and will be highly appreciated. They may rest assured that every effort will be made to merit their confidence.

(Signed) FRED. K. WALKER,
Surviving partner of W. H. Walker & Co.

MAY 15th, 1872.

They say that in said newspaper on said date there was published a conspicuous editorial notice of said advertisement and of its terms. And the public had full notice, so far as it could be given, that the new business was limited by the provisions of W. H. Walker's will.

These defendants deny and each of them denies that the present or any creditors of the firm of W. H. Walker & Co., at any time after the death of W. H. Walker, had any right in law or equity to rely upon or look to the financial ability of said Walker's estate for the security of or payment of any debts incurred by the firm of W. H. Walker & Co. after W. H. Walker's death. They deny that any creditor whatever did so look to or rely upon any responsibility on the part of W. H. Walker's estate.

It is true that the firm of W. H. Walker & Co., as organized

under the provisions of W. H. Walker's will as aforesaid, and the assent thereto of Frederick K. Walker, was ultimately unsuccessful in business, and finally became bankrupt, and was so adjudged upon the petition filed and schedules prepared by Frederick K. Walker, the person conducting and solely in charge of its affairs. The amount of its indebtedness was and is large, but is not known to these defendants. It appears, as defendants believe, fully and completely in the books of said firm, which are in complainant's possession; whether it amounts to as much as one hundred and seventy-five thousand dollars these defendants have no means of knowing. They charge that the debts properly chargeable as the debts and liabilities of said firm of W. H. Walker & Co. do not equal in amount the sum set up by claimant in his bill of complaint, but that a large number of claims and demands have been set up as against said firm in bankruptcy, which did not originate in the business of said firm, and never were and are not now debts of said firm, but have been wrongfully filed, and the complainant, though advised that they are not debts or liabilities of W. H. Walker & Co., has permitted the same to be asserted without resistance on his part, the particulars of all which will be more fully set forth hereinafter. They again deny that they or either of them, or the executors of W. H. Walker, or the estate of W. H. Walker, are or is in any ratio or proportion whatever liable to contribute in anywise to any debt or liability of said firm of W. H. Walker & Co., or that the estate of W. H. Walker is liable for any or all of the debts of said firm as partner or otherwise. They deny that any part of the estate of W. H. Walker is liable to be subjected to complainant's demand or to the satisfaction of any debt of the firm of W. H. Walker & Co. They state that under the provisions of the will of W. H. Walker so much of his estate as was at the time of his death in the business of W. H. Walker & Co. remained in the possession and control of Frederick K. Walker, and no part of it ever came to the hands of these defendants, or either of them, nor into their management or control. Frederick K. Walker alone had possession, management, control, and authority over the same. The business was one of large profit from May, 1872, to 1st January, 1873, as also in the years 1873, 1874, & 1875, all of which will hereinafter be more specifically set forth. The rents and dividends accruing from various sources to the estate of W. H. Walker were collected from time to time by F. K. Walker, one of the executors, and held by W. H. Walker & Co., as bankers for the estate, and used from time to time in the proper disbursements in and about the estate. At no time was anything in money or property used by these defendants or either of them, or by any executor, heir, devisee, or legatee of W. H. Walker, out of money or property passing through the firm of W. H. Walker & Co. in excess of actually earned profits and actual cash deposits belonging to the estate of W. H. Walker.

2nd. Further answering, these defendants say and each of them says that it is not true, and they each deny the fact to be that they or either of them, by reason of any facts averred in complainant's bill or for any cause or on any account whatever, are or is bound or liable for any debts of the firm of W. H. Walker personally or jointly as partners in said firm or otherwise. They deny that they or either of them ever claimed or owned an interest in said firm of W. H. Walker & Co. and its assets, either as executors or individually, except that the estate of W. H. Walker had an interest as aforesaid, and that profits as declared were distributable as in accordance with the will of W. H. Walker, dec'd, as herein.

48 before in the first paragraph of this answer is set forth. They never did, nor did either of them pretend to, claim any individual ownership or interest in said firm or its assets; nor did either of them ever participate in the management of the business. They never did share in any proportion any of the losses of the concern. The defendant James E. Breed never shared to any extent or sum whatever any profits of the business. Part of the profits actually earned by the firm of W. H. Walker & Co. were from time to time expended by the defendant Mary D. Walker (who was the guardian as well as the mother of the infant children of the said W. H. Walker, and the head of the family after his death) in and about necessary and proper support, education, and care of the family; and part of said profits were, by F. K. Walker, used in paying taxes and other proper expenses in and about the estate of W. H. Walker. But the profits so used by each and both said Mary D. Walker and Fred. K. Walker were strictly within the amount and sum of the actual profits earned in the period embraced between
49 2nd May, 1872, and 31st Dec'r, 1875. None of the profits or earnings of the business of W. H. Walker & Co. ever came into the hands of the def't, James E. Breed, nor did any property of said firm ever come into his possession or control, nor did he manage or control the same or any part thereof. They deny that any such pretended fact was known to any creditor of the firm of W. H. Walker & Co. They deny that they or either of them are estopped as against complainant, or against any real or pretended creditor of W. H. Walker & Co., to deny that these defendants and each of them were or are partners, and as such liable or bound to contribute to the payment of any debt of said firm of W. H. Walker & Co., and they each deny that they or either of them is liable or bound for any reason or on any account to contribute to the payment of any debt or debts of said firm, and they each deny that either of them is or ever was a partner in said firm of W. H. Walker & Co.

3d. Further answering, these defendants say that it is true that the value of the interest of W. H. Walker (at the time of his death)
50 in the then business of W. H. Walker & Co. was $82,774 $\frac{52}{100}$. The said interest and value was by his will continued in the firm of W. H. Walker & Co., as reorganized under said will. The terms and limitations under which the same was so invested are fully and entirely set forth in the will of W. H. Walker, exhibited by complainant in his bill of complaint and hereinbefore in this answer set forth, and defendants deny that the statements in complainant's bill of the purport of W. H. Walker's will in said matter is correct or accurate. They say that it is not true that the firm of W. H. Walker & Co. made no profits from and after the death of W. H. Walker, nor is it true that there were no profits for division. On the contrary, they say and charge that there were large profits made, and that the business was uniformly profitable until the year 1876, when the losses were sustained through suretyships, which brought about the bankruptcy in February, 1877. They deny that they, or either of them, or the executors of W. H. Walker,
did at any time wrongfully withdraw from said firm, in the name
51 or for the use of W. H. Walker's estate, or in the name or for the use of any person or persons whatever. They deny that they, or either of them, ever used or appropriated any part of the same to the use or benefit of themselves or of others.

These defendants have no means of knowing whether the statement by complainants of the alleged amounts drawn as part profits by W. H. Walker's estate after his death are correct or not. The books of the

firm will show, and they pray that they be produced for examination, they being in complainants' possession and control. They charge, however, that whatever division was made was entirely warranted as well by the previous prosperity of the business as by its continued prosperity after W. H. Walker's death in May, 1872, up to 1876.

In the year 1871 the actual profits were declared as being the sum of $35,712.50, and the said prosperity continued so that—

In 1872 there was realized a profit of $18,970, of which ⅔ went to estate W. H. W $12,646 96

In 1873 there was realized a profit of $36,927 $\frac{81}{100}$, of which ½ went to the said estate, F. K. Walker having by pur-
52 chase become equal partner $18,463 95

In 1874 there was realized a profit of $15,995.43, of which ½ went to said estate as entitled to an equal share .. $7,997 71

In 1875 there was realized profit of $23,561.83, of which ½ went to the estate $11,780 91

Besides the said profits so actually earned, the estate became from time to time entitled to rents, and sundry stocks and other assets of the estate were reduced to cash, and sundry dividends and an insurance policy were from time to time collected; all of which collections, sales, and reductions to cash were made by Frederick K. Walker, one of the executors, and the proceeds of the same were deposited with the firm of W. H. Walker & Co. as the bankers of the estate, and were from time to time drawn and used as convenience or necessity required. The total amount so put on deposit by said executor, Fred. K. Walker, with W. H. Walker & Co. amounted to the sum of $33,842.75, and said sum never was a part of the capital of said firm, or so had or treated.

And further, there was received by the estate of W. H. Walker,
53 deceased, a certain legacy to him bequeathed by one Agnes Veitch, amounting to $1,500, and sundry bad debts due him were collected to the extent of about $677.53, and sundry dividends on bank stocks of the estate, amounting to about $1,100, were collected; all which said collections, amounting to about $3,677.53, was received by F. K. Walker, one of the executors, and by him placed to the credit of the estate in the hands of W. H. Walker & Co. as bankers for the estate, and by the estate was used from time to time, as convenience or necessity required, and no part of the same ever formed part of the capital of the firm of W. H. Walker & Co., nor was any part of it so regarded, or treated, or represented and; the said sums before set forth, to wit, the actual profits earned as aforesaid, and the funds belonging to the estate and deposited with W. H. Walker & Co. as aforesaid, these defendants say were proper to be used and withdrawn by and for the general estate of W. H. Walker and its devisees and legatees, and they deny that for any part of said sums, or either of them, they are accountable, or the estate of W. H. Walker is accountable, to complainant, or any
54 one of the creditors of W. H. Walker, deceased. It is true that F. K. Walker did, under the provisions of W. H. Walker's will, purchase enough of the interest in W. H. Walker & Co. belonging to W. H. Walker's estate to make him, the said F. K. Walker, an equal partner, or half-owner. The proportion so bought was a ⅛ of the whole, and the price agreed to be paid therefor was $20,295.70, for which said F. K. Walker executed his three notes and paid them, and the money was credited to the estate of W. H. Walker, deceased. F. K. Walker, as manager and controller of the business of W. H. Walker & Co., kept its books, and credited the estate with said payments on the books of

W. H. Walker & Co. No part of the capital of said firm was used in paying said sum. It was earned by F. K. Walker in the business, and was not by him withdrawn from the capital of the concern.

These defendants deny that they or either of them did on 1st January, 1875, or at any other time without right or contrary to the will of W. H. Walker, withdraw from W. H. Walker's interest in the capital of said firm of W. H. Walker & Co., the sum of $14,425, or any other sum which was not profits earned by said firm or funds deposited
55 with it, or that by any such acts or doings said W. H. Walker's interest in the capital of said firm was reduced by the sum of $14,425 or any sum whatever. They deny and each deny that any sums whatever were unlawfully or wrongfully withdrawn by them or by the estate of W. H. Walker from the firm of W. H. Walker & Co. to the amount of $77,276$\frac{55}{100}$ or any sum whatever, or converted to the use of these defendants, or of either of them, or of any person whatever with any knowledge or suspicion that the same were not profits, or with any notice or knowledge that the same were withdrawn from the capital of said firm. They deny that any sums were by them or either of them or by the estate of W. H. Walker, its executors or legatees, at any time withdrawn from the capital of the firm of W. H. Walker & Co., or from the interest of W. H. Walker's estate in said capital, or that any part of any sum withdrawn by or used for the estate of W. H. Walker, was or is liable or subject to the payment of any of the creditors represented by complainant, or that any creditor was deprived of any remedy or injured to any extent whatever. They say that it is true that F.
56 K. Walker as partner in the firm did earn and, from time to time, withdrew profits:

In 1872 his share amounted to	$6,323 47
In 1873 his share amounted to	$18,463 95
In 1874 his share amounted to	7,997 71
In 1875 his share amounted to	11,780 91

In 1876 his share amounted to nothing.

They have no knowledge as to the sums withdrawn from time to time by F. K. Walker except from the allegations of complainant's bill, nor can they say whether the sums averred by complainant to have been by said F. K. Walker withdrawn are correct. They therefore deny complainant's allegations. They call on complainant to make full proof of all his allegations in said regard. They charge, however, there were large profits in the several years, proper to be withdrawn by F. K. Walker, and that no fraud or wrong doing was practiced in any withdrawing of money from the firm account by him. They charge the fact to be that F. K. Walker lived in a style and manner entirely within and suited to his pecuniary condition and to his income; that whatever of money he withdrew from the firm was expended in necessary and proper support of himself and family, or in the purchase of real estate at
57 judicious prices; among other parcels a residence for himself and family. All the money withdrawn by him (except that consumed in living) and all the property purchased by him with such money, was by F. K. Walker actually applied to the necessities of the firm of W. H. Walker & Co. when it fell into pecuniary embarrassments in 1876, and used in the payment of its debts.

They say they are informed and charge the fact to be that at the time of his death W. H. Walker was surety for divers persons, and the new firm of W. H. Walker & Co. carried said endorsements in the hope that the principals would pay in whole or part. But the parties finally (in 187–) wholly suspended and the debts had to be wholly provided for by

W. H. Walker & Co. as endorsers. Among said debts were those owed by—

James Kennedy	$9,000 00
William Keely	5,000 00
John Cawein & Co	7,000 00
Jno. M. Stokes & Son	3,500 00
J. M. Duncan	900 00
L. W. Rasdall & Holmes	700 00

They say also that F. K. Walker, the managing partner as aforesaid, had arrangements with Charles H. Gardner, or the firm of Gardner & Co., for mutual endorsements, and the firm of Gardner & Co.
58 failed in 1876, and the firm of W. H. Walker & Co. was on Gardner & Co.'s paper for a large amount more than $50,000, and had to pay and did pay the same, and in arranging to pay the same had to renew paper and pay a great deal in interest. And there was thus paid out in discharging security debts more than $76,000. All of said payments were made by F. K. Walker alone, he being, as before set forth, the only person in control of the firm or its assets, and in making such payments he used in part the property purchased by him as aforesaid and in part the assets of the firm.

They say that the real cause of the bankruptcy of W. H. Walker & Co. was the bankruptcy of Gardner & Co., and the failure of the other persons and firms for whom the firm were endorsers. In addition to which, the depressed market caused still larger losses on the forced sales compelled to be made, and the failure of one Walston, for whom the firm of W. H. Walker & Co. appeared to be surety, completed the ruin of the firm, by destroying its credit in bank.

They deny that the bankruptcy in solvency, or even any embarrassment of the firm of W. H. Walker & Co., was caused by any with-
59 drawal of funds from said firm by or for W. H. Walker's estate.

They deny that any sum whatever was wrongfully or improperly withdrawn by or for Walker's estate at any time. They deny that any excessive sum was at any time withdrawn by or for W. H. Walker's estate. They say that, so far from said estate having improperly or wrongfully withdrawn money, it did not get, in all its various withdrawals, the amount to which it was lawfully and properly entitled as profits earned and cash on deposit.

They say again that the whole management of the firm was in the hands of F. K. Walker, and that no funds were at any time used, received, or handled, or managed by def't James E. Breed. They deny that any sum representing or being any part of the capital of the firm of W. H. Walker & Co., or of W. H. Walker's interest therein, was at any time withdrawn by or for the estate of W. H. Walker, or paid over to any executor, devisee, or legatee of him, the said W. H. Walker.

They charge that F. K. Walker, as partner, did faithfully surrender all the assets of the firm in his hands at the date of bankruptcy, and also all his own estate, and all the same was received by com-
60 plainant. They charge that there have been proved against the bankrupt firm a large amount of claims which are invalid so far as they seek to affect the interest of W. H. Walker on said firm. Among them are the following:

1. A claim by the Western Bank of Louisville, on an acceptance for $8,000, purporting to have been drawn by W. H. Walker & Co., and accepted by T. Walston.

2. A claim by the Bank of Kentucky, on a promissory note for

$2,381.89, dated 7th Nov'b'r, 1876, at 3 months, purporting to be made by T. Walston to the order of and endorsed by W. H. Walker & Co.

3d. A claim by the Bank of Louisville, on an acceptance of $3,500, drawn by T. Walston, and purporting to be accepted by W. H. Walker & Co.

4. A claim by the Bank of Louisville, on a promissory note for $3,500, Nov. 23d, 1876, at 4 months, purporting to be made by T. Walston as principal, and W. H. Walker & Co. security.

5. A claim by the Bank of Louisville for $6,000, on an acceptance purporting to be made payable to and endorsed by W. H. Walker & Co.

6. A claim by the Masonic Savings Bank for $2,381.89, on an
61 acceptance of 28th Dec'r, 1876, at 40 days, purporting to be drawn and endorsed by W. H. Walker & Co., and accepted by T. Walston.

7. A claim by Henry Wolff for $2,500, on an acceptance 7th Dec., 1876, at 60 days, purporting to be drawn by W. H. Walker & Co. to the order of H. Wolff and accepted by T. Walston.

8. A claim by Henry Wolff for $2,500, on an acceptance 7 Dec., 1876, at 90 days, purporting to be drawn by W. H. Walker & Co. to the order of H. Wolff and accepted by T. Walston.

9. A claim by James A. Leach for $2,861.13, on an acceptance 13 Octo., 1876, at 4 months, purporting to be accepted by W. H. Walker & Co., and payable to and endorsed by T. Walston.

10. A claim by Geo. W. Swearingen for $, on an acceptance due 6 January, 1877, purporting to be drawn and endorsed by T. Walston, and accepted by W. H. Walker & Co.

Besides the foregoing there are others which these defendants are unable to point out, but they charge that the aforementioned notes and acceptances were never made or executed for or in evidence of any debt or liability of the firm of W. H. Walker & Co., but were purely on accommodation of other parties, and without compensation or pay,
62 to the firm of W. H. Walker & Co.; and they charge that under the partnership, as defined and limited by the will of W. H. Walker, deceased, it was competent for F. K. Walker, or any one, to use the name of W. H. Walker & Co. in the making, or accepting, or endorsing of accommodation paper, or for any purpose than the strictly legitimate business of the firm of W. H. Walker & Co.; and they deny that any part of the assets of W. H. Walker, in the firm of W. H. Walker & Co., are or have been bound by any of said paper. They say that there are other bills, notes, and acceptances proved in the bankruptcy proceedings aforesaid which, for the same reason, are invalid, and not binding on the estate of W. H. Walker, in the firm of W. H. Walker & Co., but these defendants are not able to set them out, not having possession of the books of the firm, nor being conversant with the details of its business. They charge that all the facts as to such paper, and its invalidity to bind the interest of W. H. Walker in said firm, are known to complainant, and have long been known or could easily be ascertained by him from the books of the concern and from F. K. Walker on inquiry. Yet he has entirely failed to resist or ap-
63 pose the proof of any such claims, and now prosecutes this suit chiefly at the instigation of such claimants.

They ask that complainant be compelled to furnish a list of all the accommodation paper of the firm of W. H. Walker & Co., and to resist the claims asserted on all such, and to cause the rights of each and every such claimant to be litigated in proper manner.

They again deny that they or either of them is or ever has been chargeable with any sum whatever, as wrongfully received from the firm of W. H. Walker & Co. They deny they or either of them is indebted on any account to complainant, or any creditor of W. H. Walker & Co., in any sum whatever.

Having fully answered, they pray to be hence dismissed with their costs herein most unjustly incurred.

BARRET & BROWN,
JOHN ROBERTS,
For Defend'ts named.

STATE OF KENTUCKY,
Jefferson County, ss:

James E. Breed says he is one of the executors of Wm. H. Walker, dec'd, the defendants in the foregoing action, and that he verily believes that the statements contained in the foregoing answer are true.

64 JAMES E. BREED.

Subscribed and sworn to before me by James E. Breed, this 3d day of January, 1878.

WM. F. BARRET,
Notary Public, Jeff. County, Ky.

And on the 10th day of January, 1878, came Fred. K. Walker, by Barrett & Brown, his counsel, and filed his answer herein.

The answer above referred to is as follows, viz:

Answer of F. K. Walker.

In the district court of the United States for the district of Kentucky.

The answer of Frederick K. Walker, as well in his capacity as executor of W. H. Walker as in his individual capacity, to the bill of complaint of S. E. Jones, assignee of W. H. Walker & Co., complainant.

This defendant, Frederick K. Walker, now and at all times hereafter saving & reserving unto himself all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's said bill of complainant contained, for answer thereunto, or unto so much & such parts

65 thereof as he advised is or are material or necessary for him to make answer unto, now answers and says:

That the answer of James E. Breed and Mary D. Walker to complainant's bill of complaint herein has been by him closely examined, and he finds the same to be true and accurate in all its allegations, charges, denials, and defenses. He adopts each and every part of said answer as fully and completely as though here verbatim written out, and he prays the court that said answer may in all its parts be taken as his answer, with this exception and qualification, viz: He says that as the sole person in charge of the firm of W. H. Walker & Co., and its business, after the death of W. H. Walker, he did think that he had right and power to use the name of said firm, not only in making and drawing notes and bills of exchange and accepting drafts in and about the actual business of said firm and its sales and purchases of goods, but he did also fully believe that he had power to exchange endorsements of said firm with the persons and firms who became endorsers for it, and in like manner to exchange acceptances. He says that

66 the so doing was by himself alone and not by def't James E. Breed or def't Mary D. Walker. He did so in the full belief that he was acting properly and within the scope of his power and duty, and that all such accommodation paper so made, accepted, or endorsed with the name of W. H. Walker & Co. was and is good and valid as a claim against every and all the assets of the firm of W. H. Walker & Co., and all the interest of W. H. Walker's estate therein.

In all other respects and particulars he concurs with the statements, denials, and defenses of the defendants James E. Breed and Mary D. Walker, and adopts them, and prays the court that they be taken as his answer. He prays to be hence dismissed with his costs.

JOHN ROBERTS,
BARRET & BROWN,
For F. K. Walker, Def't.

STATE OF KENTUCKY,
Jefferson County, ss:

Fred. K. Walker says he is defendant in the suit aforesaid, and that the statements of the foregoing answer are true as he verily believes.

FRED. K. WALKER.

Subscribed and sworn to by F. K. Walker this 3d day of Jan'y, 1878.

W. F. BARRET,
Notary Public, Jefferson County.

67 And on 10th Jan'y, 1878, Frank Walker & others, by his counsel, filed his answer herein, which is as follows, viz:

Answer of Frank Walker, &c.

In the district court of the U. S. for the district of Kentucky.

The answer of Frank Walker, George Walker, Lizzie W. Breed, and James E. Breed, her husband, as also of Mary D. Walker and of Mary D. Walker, guardian of the infants Walter Walker, Irving Walker, Clay Walker, and Mary Walker, to the bill of complaint of S. E. Jones, assignee of W. H. Walker & Co.

These defendants, now and at all times hereafter saving and reserving unto themselves all benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said complainant's bill of complaint contained, for answer thereunto, or unto so much and such parts thereof as these defendants are advised is or are material or necessary for them to make answer unto, now answer and say and each says that they have seen and examined the answer herein of James E. Breed and Mary D. Walker to complainant's bill of complaint, and they believe the same to be true and accurate. They have not any knowledge, information, or belief sufficient to cause them to doubt the statements of said an-
68 swer or conducing to raise any doubt on their minds concerning the same. They therefore pray that each and all the allegations, charges, denials and defenses in said answer of James E. Breed and Mary D. Walker contained to be taken and had by the court as those of these defendants and of each of them, and to that *a*nd they adopt and each adopts all and every the allegations, charges, denials, defenses, and prayers in said answer contained as fully as though here verbatim

written out and repeated and by leave of court make the same their answer and defense herein.

They pray to be hence dismissed with their costs herein.

JNO. ROBERTS,
BARRET & ROBERTS,
For Def'ts named.

JEFFERSON COUNTY, *set:*

Frank Walker says he is one of the defendants in the foregoing action and he says the statement of the foregoing answer are true as he verily believes.

FRANK WALKER.

Subscribed and sworn to by Frank Walker this 10th day of Jan'y, 1878.

W. F. BARRET, *N. P., J. C.*

And on the 23d day of February, 1878, came S. E. Jones, as-
69 signee, complainant, by counsel, and filed his replication herein, which is as follows:

Replication of S. E. Jones, assignee.

District court of the United States for the district of Kentucky.

The replication of S. E. Jones, assignee of W. H. Walker & Co., complainant, to the answer of James E. Breed, and Mary D. Walker, executors of W. H. Walker, dec'd, and to the separate answer of Fred. K. Walker, and to the answer of Frank Walker, George Walker, Lizzie W. Breed and James E. Breed, her husband, Mary D. Walker, and Mary D. Walker guardian of the infants Walter Walker, Irving Walker, Clay Walker, and Mary Walker, defendants.

This repliant, saving and reserving to himself all and all manner of advantage of exception to the manifold insufficiencies of said answers, and each of them, for replication thereto saith, that he doth and will aver and prove his said bill to be true, certain, and sufficient in law to be answered unto, and that the said answers of the said defendants and of each of them, are uncertain, untrue, and insufficient to be replied unto by this repliant, without this, that any other matter or thing whatsoever in said answer contained, material or effectual in the law to be
70 replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver and prove as this honorable court shall direct, and humbly prays as in and by his said bill he hath already prayed.

BIJUR & DAVIE,
GEO. WEISSINGER,
W. O. & J. L. DODD,
Solicitors.

And on the 16th day of March, 1878, the infant defendants, by their guardian ad litem, filed their answer herein, which is as follows, vis:

Answer of infant defendants.

In the district court of the U. S. for the district of Kentucky.

The answer of Walter Walker, Irving Walker, Clay Walker, and Mary Walker, infants, each under the age of 21 years, by John Mason Brown, their guardian ad litem, herein appointed by the court, to the bill of complaint of S. E. Jones, assignee of W. H. Walker & Co.

The said infants Walter Walker, Irving Walker, Clay Walker, and Mary Walker, by their said guardian ad litem, John Mason Brown, now and at all times hereafter saving and reserving unto themselves all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties, and imperfections in the
71 said complainant's bill of complaint contained, for answer say: That they are all and every of them under the age of 21 years, and all of them are infants of tender years. They admit and each of them by the said guardian ad litem admits every and all the allegations of complainant's bill of complaint which are or may be for the benefit of these infant defendants or either one or more of them, and they deny each and every allegation, charge or complaint of said bill which is or may be to the injury or prejudice of them or either one or more of them. And especially do they deny that any part of the estate devised by W. H. Walker, dec'd, to them or either of them or to any one of the children of s'd W. H. Walker, dec'd, is in any manner or to any extent or upon any claim in law or equity bound, subject or liable to any claim of complainant as assignee in bankruptcy or otherwise. They pray the court to protect in all respects the rights and interests of them and of each of them. They pray that complainants' bill of complaint be dismissed and that they have judgment for their costs.

WALTER WALKER,
IRVING WALKER,
CLAY WALKER,
MARY WALKER,
Infants under the age of 21 years,
By JOHN MASON BROWN,
Their g'd'n ad litem.

And on the hearing of this cause the following depositions were read:

The deposition of Wm. C. Nones, taken for the complainant, is as follows, viz:

72 UNITED STATES OF AMERICA,
District of Kentucky, City of Louisville ss:

Be it remembered that on this twenty-first day of March, in the year of our Lord one thousand eight hundred and seventy-eight, I, James A. Beattie, a commissioner duly appointed by the circuit court of the United States for the district of Kentucky, and commissioned as such, with power and authority to take acknowledgments of bail, affidavits, and the depositions of witnesses in civil cases, and to exercise the other powers conferred on commissioners by acts of Congress, did call and cause to be and personally appear before me, at the office of Jones, Halsey and Nones, in the city of Louisville and State aforesaid, William C. Nones, to testify, and the truth to say, on the part and behalf of the complainant in a certain suit or matter of controversy now depending and undetermined in the circuit court of the United States for the dis-

trict of Kentucky, wherein Stephen E. Jones, assignee of Fred.
73 K. Walker, and W. H. Walker & Co., bankrupts, is complainant, and W. H. Walker & Co. and others are defendants in equity.

And the said WILLIAM C. NONES, being about the age of thirty-three years, and having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth, in the matter of the controversy aforesaid, I did carefully examine the said William C. Nones, and he did thereupon depose, testify, and say as follows, viz:

Examined by Martin Bijur, George M. Davie, George Weissinger, and John Dood, esquires, counsel for complainant:

1. Question. What are your business relations to the complainant in this cause, and what were they at the time of the adjudication in bankruptcy of the defendants?

Answer. Then and now I was a partner in business with the complainant, together with E. T. Halsey.

2. Question. Has there been any interruption in that relation between the times stated?

Answer. None.

74 3. Question. Did you obtain possession of the firm's books of Wm. H. Walker & Co. after their being adjudged bankrupts? And, if so, when and from whom?

Answer. The books of W. H. Walker & Co. came into the possession of the complainant, Stephen E. Jones, and have been kept in the office of Jones, Halsey and Nones since the complainant's appointment as assignee. They were received from Fred. K. Walker, who was a member of the firm of W. H. Walker & Co., and brought from the store-room of W. H. Walker & Co. in an express wagon on or about the 28 day of March, 1877.

4. Question. Identify those books of the firm which represent the accounts of Wm. H. Walker, dec'd, immediately preceding his death, and the accounts of Wm. H. Walker's estate, and of the members of the firm of Wm. H. Walker & Co. since the death of Wm. H. Walker, dec'd, up to the time of the bankruptcy herein. Designate those books by their names, which they bear as account-books, and by letters, if
75 they are of a series, and classify the letters according to the years which they represent.

Answer. Ledger B, of W. H. Walker & Co., folios 1, 2, 3, and 4, contains a statement of W. H. Walker's account from December 31st, 1870, to May 10th, 1872, which latter date was about the time of his death. On folio 4 of the same ledger there is entered one credit item, June 20th, 1872. The same ledger, folios 6 and 9, and ledger C, of the same firm, folios 2, 3, 4, 5, 6, 7, 8, & 9, and ledger D, of the same firm, folios 2, 3, 4, & 5 contain a statement of the account of the estate of W. H. Walker, commencing on the 10th day of May 1872, and ending on the 7th day of February, 1877; said ledger B, folios 19 & 20, and said ledger C, folios 10, 11, 12, 13, 14, 15, 16, 17, and 18, and said ledger D, folios 12, 13, 14, 15, 16, and 17 contain a statement of the account of Fred. K. Walker from the date of the death of W. H. Walker to the date of the bankruptcy of W. H. Walker and Co.; said accounts of W. H. Walker and of the estate of W. H. Walker are the accounts of the partners since
76 the death of W. H. Walker. Ledger B contains *contains* the accounts of the partners, debtors, and creditors of W. H. Walker & Co. from January 1st, 1871, to August 13th, 1872; ledger C contains like accounts from August 13th, 1872, to May 1st, 1875, and ledger D contains like accounts from May 1st, 1875, to the date of the bankruptcy of H. W. Walker & Co.

5. Question. Mark those books with some sign and thus make them by reference part of your deposition.

Answer. I have marked each of said books with my initials "W. C. N., March 21st, 1878," on the upper left-hand corner of the first fly leaf, and I make them part of my deposition.

6. Question. Are you an experienced book keeper?

Answer. I am.

7. Question. Were the books referred to carried on and kept in the form of double entry in the business community?

Answer. They were.

8. Question. Are you acquainted with that form and with the technical meaning of the entries under that form?

77 Answer. I am.

9. Question. What capital investment was there in the business of Wm. H. Walker & Co., to the credit of Wm. H. Walker, dec'd, on or about the 10th day of May, 1872, the time of his death?

Answer. The account of W. H. Walker, ledger B, folio 4, is balanced as of the 2nd of May 1872, and shows the sum of eighty-nine thousand seven hundred and twenty-one dollars and fifty-nine cents ($89,721.59) standing to his credit as of that date.

Thursday, March 21st, 1878, adjourned the taking of this deposition until Tuesday, March 26, 1878, at 10 o'clock a. m., at which time met pursuant to adjournment and continued taking of the same.

10. Question. Examine the first ledger in the order in which the books were kept from the time of the death of W. H. Walker, and state how much was withdrawn according to the entries in that ledger, for the estate of W. H. Walker, dec'd, by his executors. I mean net, that is to say the amount withdrawn from the business over and above the

78 credit to which the estate was entitled exclusive of the item of profits credited to the account of that estate.

Answer. I find by examining ledger B, folios 6 and 9, that the estate of W. H. Walker from the 10th day of May, 1872, to the 9th day of August, 1872, drew out the sum of $2,024.77 more than it put in the business of W. H. Walker & Co. during the same period. There were no profits placed to the credit of the estate during that period.

11. Question. Now examine the ledger next in order, and answer the same questions in regard to the entries in that book.

Answer. Ledger C, folio 2, shows that said estate from the 14th day of August, 1872, to the 31st day of December, 1872, drew out the sum of eleven hundred and seventy-one dollars and seventy-seven cents more than it put in during that period. This amount excludes the sum of $12,646.96 which is placed to the credit of said estate, December 31st, 1872, as said estate's share of the profits for the year 1872. The same ledger, folios 2, 3, 4, 5, and 6, shows that the estate of W. H. Walk-

79 er, from the first day or January, 1873, to the 31st day of December, 1873, put into the business the sum of $8,766 more than it drew out during the same period. This amount includes the sum of $20,295.70 which is credited to said account as the value of a one-sixth interest in the concern of W. H. Walker & Co., sold to and charged Fred. K. Walker's account. It excludes the sum of $18,463.95, which was placed to the credit of said estate, December 31st, 1873, as its share of the profits for the year 1873. Said ledger C, folios 6, 7, and 8, shows that from the 1st day of January, 1874, to the 31st day of December, 1874, said estate drew out the sum of $39,649.75 in excess of the amount it paid in during the same period; excluding the sum of $7,997.71, which was placed to the credit of said estate, December 31st, 1874, as its share

of the profits of the year 1874. Said ledger C, folio 9, shows that from the 1st day of January, 1875, to the 30th day of April, 1875, said estate put in the sum of $7,568.42 more than it drew out during the same period. This includes, as put in, the sum of $14,425.00, for
80 which the account is credited by a charge of a like amount against W. H. Walker's capital account.

12. Question. Was the price of the one-sixth interest in the business purchased by Fred. K. Walker and credited to the estate of W. H. Walker as of January 1, 1873, for $20,295.70, paid in by Fred. K. Walker and charged to cash, or was it simply credited to that estate and charged to Fred. K. Walker?

Answer. Said sum was not paid in in cash, but was charged to the account of Fred. K. Walker, January 1st, 1873, as shown by said ledger C, folio 11.

13. Question. Was the sum of $14,425.00, which was credited January 1st, 1875, as received from the capital stock of Wm. H. Walker, dec'd, actually received in money or merchandise, or was it simply credited, because of a charge of a like amount charged against the capital stock of Wm. H. Walker, dec'd?

Answer. It was not received in money or merchandise, but the credit was entered and the counter-charge made the same day
81 of the said amount against W. H. Walker's capital account, as shown by said ledger C, folio 1.

14. Question. Now please exclude the item of $20,295.70 purchase money credited and the item of $14,425.00 credited for corresponding charge to W. H. Walker's capital account from the credits to which the estate was entitled, and then state the aggregate amount withdrawn by and for the estate of Wm. H. Walker, deceased, exclusive of the profit items credited to that account over and above the amount otherwise credited in ledger C.

Answer. Excluding the items mentioned, I find the aggregate amount drawn out to be $59,207.14 (fifty-nine thousand two hundred & seven $\frac{14}{100}$ dollars), after allowing all other credits except those stated in the question, to wit, the item of $20,295.70, January 1st, 1873; the item of $14,425.00, January 1st, 1875, and the item of $12,646.96, December 31, 1872 (share of the profits of 1872); the item of $18,463.95, December 31, 1873 (profits of 1875); the item of $7,997.71, December 31,
82 1874 (profits of 1874).

15. Question. Now examine the ledger next in order, and answer the rest of my question 10, as if repeated here, in reference to this last book.

Answer. Ledger D, folios 2 and 3, shows that from the 1st day of May, 1875, to the 31st day of December, 1875, said estate drew out the sum of $10,536.46 more than it put in during the same period, excluding the sum of $11,780 91, which was placed to the credit of said estate December 31st, 1875, as its share of the profits of the 1875; and said ledger D, folios 3, 4, and 5, shows that from the first day of January, 1876, to the 7th day of February, 1877, said estate drew out the sum of $2,754.20 more than it put in during that period. There was no profit placed to the credit of said estate during the last mentioned period.

16. Question. Examine the last ledger account of "profit and
83 loss," and state with what amount of loss the business of Wm. H. Walker & Co. is credited, and what share such loss, if any, is charged to the estate of Wm. H. Walker, dec'd?

Answer. Ledger D, folio 86, contains a profit & loss account running from December 31, 1875, to February 24, 1877, which shows a loss dur-

ing that period of $24,372.47. This loss is not distributed to the partners' accounts.

17. Question. Is that account closed in the books and does it contain the last entries of profit and loss account in the books of Wm. H. Walker & Co.?

Answer. The account is not closed on the books. It contains the last items that were charged or credited to that account up to the time when the said books came into the possession of the assignee.

18. Question. The complainant Stephen E. Jones was elected assignee of Wm. H. Walker & Co. on the 27th of March, 1877, the adjudication in bankruptcy took place February 27, 1877; now state what es-
84 tate of the firm of W. H. Walker & Co. came into the possession of the assignee from the bankrupts. State the kind and gross value of each kind.

Tuesday, March 26, 1878, adjourned the taking of this deposition until Monday, April 1, 1878, at 10¾ o'clock, at which time met pursuant to adjournment and continued the taking of the same.

Answer. In answer to this question I file herewith and make part of my answer a statement containing ten sheets of paper, each sheet of which is marked with my initials, "W. C. N.," which shows a detailed statement of all the assets of W. H. Walker & Co., which came to the hands of the assignee. Said statement shows the value of said assets as given in the schedules of said bankrupt; the amount realized from said assets by said assignee so far as the same have been administered and the estimated value of the outstanding assets. The value of
85 the estate as given in the schedules of the bankrupt is $151,282.52. This valuation includes notes and accounts amounting to $30,626.11, which are classified in said schedules as doubtful. This gross valuation is made up as follows, viz:

Real estate	$7,140 03
Cash	313 62
Bills of exchange & promissory notes	4,177 47
Stock in trade, consisting of whiskies & other liquors, including rectifying apparatus and office furniture	83,772 46
Debts due on open account	48,187 20
Stocks in incorporated companies	7,691 74
Total	$151,282 52

19. Question. What is the amount realized from each kind of assets as far as they have been disposed of, and what kind of assets are still undisposed of?

Answer. The cash on hand has been realized	$313 62
The amount realized from bills of exchange and promissory notes is	2,285 78
From stock in trade, including rectifying apparatus & office furniture	66,016 70
From open accounts	15,435 30
From stocks in incorporated companies	3,570 00
Total realized	$87,621 40
86 The assets undisposed of are real estate in Vicksburg, Mississippi, which has been sold, to be paid for as soon as good title can be made to the same, for.	2,500 00

The bills of exchange and promissory notes remaining outstanding are uncollectible and considered worthless.

There is whiskey which is included in the valuation of the stock in trade as given in the schedule, which is by for debts of W. H. Walker & Co., estimated to be worth... $5,500 00

The open accounts remaining uncollected are uncollectible and considered worthless, with the exception of one of 16 50

There are 18 shares of Shreveport Gas Company stock remaining on hand undisposed of, the estimated value of which is 720 00

Total estimated value of assets undisposed of..... $8,736 50

20. Question. What was the amount of liabilities of Wm. H. Walker & Co. at the time of the bankruptcy?

Answer. They owed bills payable..... $175,575 20

They owed open accounts..... 22,748 52

Total absolute liability $198,323 72

In addition to the above they were liable upon

87 Thomas Walston's paper for his accommodation to the amount of $33,995 97

21. Question. What percentage on their debts did their assets pay? Separate the debts secured from the debts unsecured.

Answer. The secured debts, secured by pledge of whiskies, were..... $55,423 22

Debts secured by pledge of Merchants' Insurance Co. stock 2,000 00

$57,423 22

In addition to the above there were securities consisting in bond, stock in Louisville Insurance Company, and $833.33 in cash, the whole amount of said securities being of the value of $3,126.66, which were pledged for an undetermined liability on discounted paper with the Louisville Banking Company. The unsecured debts amounted to $142,900.50, besides the liability on Thomas Walston paper heretofore given.

22. Question. Were the whiskies which were pledged as securities embraced in the amount of whiskies stated by you as part of assets?

Answer. They were.

88 23. Question. You have not answered my question about the percentage paid to the creditors of Wm. H. Walker & Co. out of their assets. Answer it now both as to the secured and unsecured creditors.

Answer. The secured debts have been paid in full, and a dividend of thirteen (13) per cent. paid to the unsecured creditors.

24. Question. To what extent do the assets which come to the assignee fall short of paying the debts of Wm. H. Walker & Co. in full? Include in such assets the estimated value of all the assets remaining undisposed of.

Answer. Excluding the indebtedness of Thomas Walston, on which W. H. Walker & Co. are liable, the deficiency is $101,965.82. Including that indebtedness, the deficiency is $135,961.79. This includes as assets $8,736.50, which is the estimated value of assets outstanding and not yet administered.

89 25. Question. What amount of the choses in action given in as assets were due and unpaid on the day of the schedules filed, and what amount of these were due and unpaid in January, 1876;

what, if any, in January, 1875; what, if any, in January, 1874; what, if any, in January, 1873?

Monday, April 1st, 1878, adjourned the taking of this deposition until Wednesday, April 3rd, 1878, at 10 o'clock a. m., at which time met pursuant to adjournment, and continued the taking of the same.

Answer. The statement which I have heretofore filed in answer to question No. 18 shows the amount of choses in action given in as assets and unpaid on the day of the filing of the schedules. The statement which I now file, mark' A, is a list of choses in action remaining unpaid at this time, which were open on the books, and carried as assets when the said schedules were filed, all of which were past due and unpaid on the 1st day of January, 1873, amounting to $4,474.04. The statement which I now file, marked B, is a similar statement of choses in
90 action now unpaid carried as assets and past due and unpaid on the first day of January, 1874, amounting to $5,965.94. These are in addition to those past due and unpaid January 1st, 1873. The statement which I now file, marked C, is a similar list of choses in action in addition to those in said statements A & B, still unpaid, carried on the books as assets, and past due and unpaid on the 1st day of January, 1875, amounting to $10,500.61. The statement which I now file, marked D, is a similar list of choses in action in addition to those in the said statement A, B & C, still unpaid, carried on the books as assets, and past due and unpaid on the 1st day of January, 1876, amounting to $21,341.61. The aggregate of said 4 statements is $42,282.20. I make said four statements part of my depostion.

26. Question. Are the choses in action which are embraced in
91 the four statements filed as parts of your last answer put to profit and loss after their maturities in the years in which they became respectively due, or was the profit declared on the basis of the full value of those choses in action as assets of Wm. H. Walker & Co.?

Answer. They were not put to profit and loss after their respective maturities in the years in which they became respectively due, with the exception of those shown in said statements to have been charged to profit & loss on the 1st day of December, 1874, and which, under that date were taken from profit & loss and charged back to the respective parties. The profit was declared upon the full value of all the choses in action mentioned in said statements.

27. Question. Was the stock in incorporated companies carried as assets at the par value of such stock during all the years during which it was held?

92 Answer. The stock in the Louisville Industrial Exposition Company and the stock in the Planters' National Bank were each carried at their par value during said years. The stock in the Louisville Insurance Company was carried at $1,460.00; its par value was $1,000.00. The stock in the Shreveport Gas Company was carried from February 17th, 1875, at $1,781.74; its par value was $1,800.00. The stock in the Merchants' Insurance Company was carried at $1,250.00; its par value was $2,500.00.

28. Question. Itemise the stock by the number of shares and the corporations, and state the market value of such shares as compared with their par value during the year during which they were carried as assets, and during which profits were declared.

Answer. There were forty shares of Louisville Industrial Exposition stock, the par value of which was $25\frac{00}{100}$ per share; fifty shares of the Planters' National Bank stock, the par value $100\frac{00}{100}$ per share—upon

this bank stock dividends were declared in liquidation, from time
93 to time, till the stock was reduced to $950.00 par value; fifty shares of Merchants' Insurance Company stock of the par value of 50.00 per share; eighteen shares of Shreveport Gas Company stock of the par value of $100.$\frac{00}{100}$ per share, and ten shares of Louisville Insurance Company stock of the par value of $100.$\frac{00}{100}$ per share. I do not know the market value of any of these stocks at the times the profits were divided.

29. Question. Did the assignee in bankruptcy sell the stocks? If he did, state how much was realized from each kind.

Answer. He sold the Louisville Industrial Exposition stock—40 shares—for $200.00; the Louisville Insurance Company stock—10 shares—for $1,220.00. He received dividends in liquidation on the 50 shares of Merchants' Insurance Company stock to the amount of $2,150.00. The Shreveport Gas Company stock and the Planters' National Bank stock remain unsold.

30. Question. Did the fixtures and distilling apparatus bring the price at which these were carried as assets?

94 Answer. There is no separate account on the books for fixtures, rectifying apparatus, and office furniture. They were invoiced February 10th, 1877, at $2,500.00, carried in value of stock to the credit of merchandise account. The amount realized by the assignee from the sale of these articles was $176.60.

31. Question. Who bought them?

Answer. A part of the rectifying apparatus, consisting of eight tubs, was sold to J. H. Langan for the sum of $68.00; the balance of that apparatus and the fixtures and office furniture were sold at an auction sale made by S. G. Henry and Co., and the greater part bought by Fred. K. Walker at that sale.

32. Question. What business, in what name, and by whom is carried on in the storehouse occupied by the late firm of Wm. H. Walker & Co.?

Answer. Cochran and Fulton are occupying the store now, carrying on the business of wholesale liquor dealers.

33. Question. Who occupied it immediately after the said sale?

95 Answer. It was occupied by Walker & Co. I understand that that firm was composed of Fred. K. Walker alone.

34. Question. For what kind of a business, and for how long, was it occupied by Walker & Co.?

Answer. It was occupied for the business of a wholesale liquor dealer by Walker & Co., from about March, 1877, until about the 15th of December, 1877.

35. Question. Are Walker & Co. still in the same business? And if so, where is it carried on?

Answer. They are still in the same business in a store on the south side of Main street, opposite the Galt House, to which they moved from the above named house when they vacated it.

Wednesday, April 3rd, 1878, adjourned the taking of this deposition until Thursday, April 4th, 1878, at 3 o'clock p. m., at which time met pursuant to adjournment and continued the taking of the same.

36. Question. Were any of the choses in action, which were
96 due and unpaid in January, 1873, '74, '75, and '76, put to profit & loss in any other year or at any time since the death of Wm. H. Walker, dec'd?

Answer. None of the choses in action mentioned in the lists which I have heretofore filed, marked A, B, C, & D, were put to profit & loss at any time after the death of W. H. Walker, except those mentioned in said lists as having been put to profit & loss on the first day of December, 1874, and under the same date taken out of profit and loss and charged back to the parties. The result of these entries was the same as if the said choses in action had never been put to profit & loss.

Thursday, April 4th, 1878, adjourned the taking of this deposition until Wednesday, April 10th, 1878, at 10 o'clock, at which time met pursuant to adjournment and continued the taking of the same.

Cross examined by JOHN MASON BROWN & JOHN ROBERTS, esquires, counsel for the defendants:

97 37. Question (X). In declaring the profits of a mercantile concern for any current year is it the habit of merchants to reduce all assets to actual cash by collection, or are not the accounts on hand estimated and their estimated value taken into account on the trial balance?

Answer. The accounts that are on hand not yet due, and which are considered good, are generally considered as assets in estimating profits. Those that are not past due and unpaid are usually charged to "suspense," or "profit & loss," and a portion of the profit set apart and not distributed to the partners, to provide for these accounts, which are so past due unpaid.

38. Question (X). Is it not in a great degree a question of judgement whether an account due shall be treated as good, doubtful, or worthless in classifying assets?

Answer. I suppose that it is to some extent, but if accounts are
98 past due and unpaid, and especially if the accounts have been closed by notes or accepted drafts, and those notes and acceptances have been discounted in bank and taken up at their maturities by the party discounting same, it is a strong evidence that the accounts are uncollectible and should be charged to "profit & loss."

39. Question. Do not the books of the firm, already referred to by you, show that F. K. Walker, the active and managing partner, did in his annual declaration of profits make a classification of the accounts, charging some off to profit and loss and carrying others to assets?

Answer. The books show that some accounts were charged to "profit & loss" and others were carried as assets.

40. Question (X). You have personal knowledge of the bankruptcy proceedings in the matter of W. H. Walker & Co., and of the various exceptions to proofs of debt, if any, have you not?

Answer. Yes, sir.

99 41. Question (X). Has the assignee in bankruptcy interposed any objection or exception to any one of the proofs of debt filed in the case and which arise or are alleged to arise out of paper indorsed for the accommodation of one T. Walston? Please refer to the record of bankruptcy proceedings in the case, including the proofs of debt, and make them part of your deposition.

Answer. The assignee filed no exceptions in the case to any proof of debt, but all the debts that were proved based upon the paper executed by W. H. Walker and Company for the accommodation of Thomas Walston were excepted to by one of the creditors, proof taken, and upon hearing all of said exceptions were overruled by Judge Bullard.

100 This appears in the record of the proceedings in bankruptcy in the matter of W. H. Walker & Co., bankrupts, pending in the

United States district court for the district of Kentucky. I refer to the said record and make the same a part of my deposition.

42. Question (X). Do' not the ledger referred to by you show that part of the accounts charged off at the various times to "profit & loss" were afterwards collected?

Answer. I could not tell without examining the journal entries referred to in the profit and loss account, but I suppose that such is the case. It is usually the case that collections are made of some small part of accounts that have gone to "profit and loss," and when such collections are made they are credited directly to that account, and the amounts so received are then distributed as profits at the end of the year in which they are collected.

Re-examined by MARTIN BIJAR and GEORGE WEISSINGER, esquires, counsel for complainant:

101 43. Question. Please read my question-in-chief and your answer No. 36, and then the defendant's question 39 and your answer thereto, and then state what accounts or choses in action were charged to profit and loss, and state which of those contained in your list of unaid choses in action, if any, were ever charged to "profit & loss."

Answer. In my answer to question 36 I stated that none of the choses in action mentioned in the list therein referred to were ever put to "profit & loss" at any time after the death of W. H. Walker, except those mentioned in said list as having been put to "profit & loss" on the first day of December, 1874, and under that same date taken out of "profit & loss" and charged back to the parties. In my answer to question 39 I stated the books show that some accounts were charged to "profit & loss" and others were carried as assets. The accounts that were charged to "profit & loss," referred to in my answer to question 36. The latter were never put to "profit & loss" at any time, except as stated in said answer.

44. Question. What choses in action were charged to "profit & loss," and when?

102 Answer. The following accounts were put to "profit & loss":

1872.			
June	7.	Lampkin & Eggleston	$84 60
"	8.	Bevill & Son	13 15
"	"	John Chesterfield	25 00
July	13.	Roth & Menges	52 34
"	"	J. W. Toomer	3 05
"	"	H. J. Pace	54 00
"	"	Leafinney & Miller	25 00
"	"	Charles Cohen	38 65
"	"	Warfield & Co	36 67
"	"	Russell & Co	106 75
"	19.	Solomon Debolt	39 25
"	"	John Crouch	85 33
"	22.	John Sieben	72 63
Aug.	8.	Fayette Russell	259 15
"	12.	E. P. Burn's note	354 20
"	"	Holzman & Kochie's do	73 36
"	"	John L. Hudson's do	93 01
"	"	I. I. Haynie's do	158 00
"	"	J. H. Carter's do	235 16
"	"	P. J. Shaughnessy's do	61 25

Aug.	13.	Webb & Dean's do	347 65
"	"	John McCostine's do	43 20
"	13.	George Matthews	59 70
"	"	Keenan & Gorman	41 00
"	"	J. Snacklet	67 20
"	"	Gottlieb Muller	34 00
"	"	J. C. Parks	277 00
"	"	Pat Ward	199 95
"	"	R. I. Moose	229 48
"	"	Lloyd & Norwood	371 70
103			
"	"	A. M. Fennell & Co	54 90
"	"	Thos. J. Melone	248 00
"	"	Webb & Dean	18 00
"	"	Frank Hambley	39 70
"	"	C. U. Stephens	23 50
"	"	Moore & Bro	269 38
"	"	Charles Mapes	110 00
"	"	John Glaspie	289 50
"	"	Daniel Flynn	118 75
"	"	E. Henst	42 75
"	"	A. J. Collier & Co	82 20
"	"	G. H. Wilson	44 75
"	"	Paroquet Springs Co	141 00
Aug.	19.	W. F. Steele	84 69
"	"	W. M. Ward	299 86
"	"	Charles Martin	80
"	"	Shipman, P	206 85
Sept.	20.	Edward Ellers	138 65
Oct.	31.	Philip Degman	218 90
"	"	D. H. Davey	124 50
"	"	John Simpson	74 50
"	"	K. Kundson	76 77
Nov.	30.	Fish & Lee	10 00
"	"	G. C. Clough	49 00
"	"	G. S. Cole	307 36
"	"	Buford & Dent	50 00
"	"	W. H. Dumond	158 63
"	"	M. H. Caldwell	169 45
1872.			
Nov.	30.	I. B. Stephens	$83 00
"	"	J. P. Winchester & Co	82 25
"	"	M. Burke	45 63
"	"	Quarles & Bower	15 00
104			
"	"	John E. Rosette & Bro	145 40
"	"	Charles Horn	51 70
"	"	J. M. Roberts	49 85
"	"	W. R. Higgins	10 00
Dec.	16.	Mrs. B. Fitzpatrick	36 70
"	"	J. J. Boyd	70 95
"	"	W. M. McAfee	42 70

Dec.	16.	Wm. Baxter		347 25
"	"	Howard & Turner		239 15
"	"	Kolb & Courice		1,516 63
"	"	S. C. Lung		134 88
"	"	Lazensky & Cody		175 45
"	"	Anderson & Allen		174 31
"	"	I. W. Wells		173 16
"	"	H. Pearse		398 14
"	"	Mrs. M. B. McDonald		23 90
"	"	J. A. Sitton		133 53
"	"	P. A. Shumaker		109 78
"	"	C. H. Shepherd		1,372 48
"	"	R. Clancey		75 85
"	"	G. W. Allen		161 90
"	"	Partee, Harbert & Co		660 50
"	"	W. P. Stone		42 70
"	"	Winifee & Millsaps		57
"	"	S. M. Sandiders		178 28
"	"	P. Hitzsimmons		699 98
"	"	J. Viller		689 40
"	"	Hayes & Maund		74 83
"	"	J. R. Diamond & Co		908 21
"	"	Frank Kirkpatrick		26 65
"	"	J. M. Mathews		114 85
"	"	E. C. Williams		329 30
105				
"	"	Look, Benfield & Bro		711 07
"	"	Moody Bros		3 18
"	"	Col. McClume		50
"	"	H. G. Treiners		213 25
"	"	Smith & Kellett		1 88
"	"	E. B. Sylvester		514 85
1873.				
March	22.	P. Cary		204 60
June	3.	Whessen & Welsby		28 50
"	16.	Thomas K. Ferguson		189 50
Oct.	1.	Bruce & Steele		156 25
Dec.	18.	Shepherd, Baldwin & Co		108 26
"	20.	John Cawein & Co., note		300 00
"	"	M. J. Richardson,	do.	99 60
"	"	Affleck & Watson,	do.	183 62
"	"	H. J. Osgood,	do.	120 88
"	"	Same,	do.	120 87
"	"	S. W. Hull,	do.	77 83
"	"	Affleck & Watson,	do.	239 78
"	"	S. W. Hull,	do.	136 42
"	"	Affleck & Watson,	do.	311 13
"	"	W. A. Sewell,	do.	127 25
"	"	John Cawein & Co.,	do.	300 00
"	"	B. F. Fay & Co.,	do.	167 30
"	"	Johnson & Niver,	do.	79 72
"	"	John Cawein & Co.,	do.	150 00
"	"	R. S. Sayward,	do.	275 65
"	"	Beatty & Gibson,	do.	292 10

1873.			
Dec.	30.	H. J. Osgood	$6 95
"	"	W. T. Anderson	64 75
"	"	Louisville Steam Lithographing Co	100 00
"	"	Perry & Toomer	78 00
"	"	W. H. M. Carty	263 50
106			
"	"	F. W. Smith	221 95
"	"	Hannah & Co	107 50
"	"	S. W. Hall	166 25
"	"	G. H. Buck	348 53
"	"	Carr & Walsh	316 20
"	"	Hubert Trefeld	65 00
"	"	Lewis & Jones	9 50
"	"	Col. McCraw	4 50
"	"	John M. McCarty	357 15
"	"	J. Mosher	27 22
"	"	Collins, Markham & Co	48 20
"	"	P. B. Smallwood & Co	234 35
"	"	W. D. McCall & Co	171 10
"	"	L. A. Roberts & Co	40 05
"	"	Jas. Buchanan	384 85
"	"	P. Meguire	265 50
"	"	H. Watkins & Co	324 28
"	"	Fanning, Stables & Co	647 56
"	"	Jas. Hendricks	473 05
"	"	D. W. Kyle	64 75
"	"	Cox & Co	217 25
"	"	I. Kahn & Bro	1 00
"	"	Smith, Jones & Co	312 51
"	"	Phillips Bros	1,148 34
"	"	J. C. Haynes	5 35
"	"	Sargent & Born	204 75
"	"	Snidley & Whipps	208 50
"	"	J. Harper	8 00
"	"	B. Warner	106 25
"	"	Eddy & Funt	147 88
"	"	Charles Averrill	240 50
1874.			
June	18.	Phillips & Garrett	41 50
107			
July	14.	Cregg & Ford	1 35
"	"	C. R. Woodruff	8 00
"	"	Palmer, Cole & Stout	69 32
"	"	Russell, Raney & Co	68 55
"	"	G. L. Brooks	*434 65
"	"	G. W. Swearingen	1 00
"	"	G. W. Allen	54 25
"	"	James Kennedy	600 00
"	"	Col. Stewart	28 00
"	"	Proctor & Proctor	1 25
"	"	R. J. Price	2,332 52

July	14.	S. C. Baldwin	2 1
"	"	W. W. Pearce	9 55
Oct.	1st.	G. S. Masters	561 12
"	"	W. C. Howard & Co	90 67
"	"	Cretty & Bush	41 65
"	"	J. R. Dougherty	149 50
"	"	A. S. Ramble	67 35
"	"	Parrish & Lillienstein	452 21
"	"	A. P. Rapp	201 60
"	"	G. S. Masters & Kear	163 38
"	"	K. R. Cobb	28 50
"	"	E. Harle	150 13
"	"	Jas. A. Ellis	594 23
"	"	Adams & Bean	1,188 01
1877.			
Jan'y	15.	C. Clacius	324 13
1878.			
Jan'y	15.	W. F. Rice	$1,090 52
"	29.	John Stealy	545 41
"	30.	Galt House	61 16
Feb'y	10.	P. H. Moorman	648 35
"	20.	G. F. Haas	31 70
108			
Feb'y	20.	Tho's Brophey	640 53

The following choses in action were charged to "profit & loss" on the 1st of December, 1874, and under the same date credited to "profit & loss," and charged back to the parties, to wit:

1874.			
Dec.	1.	R. S. Ansley	$330 34
"	"	M. E. Palmer & Co	50 00
"	"	J. V. Hutton	101 75
"	"	Sullivan and McKenna	280 49
"	"	Cole and Billingsley	257 50
"	"	L. B. McClenahan	1,003 55
"	"	McClenahan Bros. & Co	1,286 55
"	"	Heatfield, Bogel & Co	1,100 00
"	"	T. P. S. McCowan	225 88
"	"	R. Trenerr	50 02
"	"	John McDermot	198 30
"	"	Duncan and Cole	213 40
"	"	G. H. Dyke	71 95
"	"	O'Connor & Rafferty	43 25
"	"	Elias Duncin	397 50
"	"	M. Gimblin	55 50
"	"	J. A. Stinson	291 60
"	"	J. J. Findley	1,489 00
"	"	Thos. E. Keater	44 25
"	"	S. R. Blaunx	207 53
"	"	Kyle & Webb	217 08
"	"	D. H. Simpson	297 60
"	"	H. Karaghan	199 30
"	"	F. V. Franks & Co	183 38
"	"	Russell & Corley	62 03
"	"	T. J. Rogers	81 32

109

Dec.	1.	P. R. McLaughlin	233 50
"	"	Adams & Bean	690 51
"	"	W. S. Hendrux	47 25
"	"	C. A. Kirby, agent	162 63
"	"	B. J. Walker	18 80
"	"	Ryan & Evans	11 00
"	"	R. F. Childs	176 35
"	"	W. H. Claxton	513 25
"	"	W. S. Humason	106 85
"	"	U. McIver	53 55
			$11,344 76

WILLIAM C. NONES.

UNITED STATES OF AMERICA,
District of Kentucky, City of Louisville, ss:

Be it remembered that on this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, I, James A. Beattie, a commissioner duly appointed by the circuit court of the United States for the district of Kentucky, and commissioned as such, with power and authority to take acknowledgements of bail, affidavits, and the depositions of witnesses in civil cases, and to exercise the other powers conferred on such commissioners by the acts of Congress, do hereby certify that the reason for taking the foregoing deposition is, that the same was taken in the foregoing cause pending in
110 equity in the said circuit court of the United States for the district of Kentucky.

I further certify that no notification of the time and place of taking the said deposition signed by me was made out and served on the defendants or their attorneys to be present at the taking of the deposition and to put interrogatories, if he or they might think fit, because the attorneys for defendants had been duly notified by the attorneys for complainant, and were actually present at the taking of the said deposition.

I further certify that on the twenty-first day of March, A. D. 1878, and other days above stated, I was attended by counsel for all the parties and by the witness, who was of sound mind and lawful age, and the witness was by me carefully examined and cautioned and sworn to testify the whole truth, and the deposition was by me reduced to writing, in the presence of the witness and from his statements, and after carefully reading the same to the witness, he subscribed the same in my presence. I have retained the said deposition in my possession, for the purpose of delivering the same with my own hand to the court, for which
111 the same was taken.

I further certify that I am not of counsel or attorney for either of the parties in said deposition and caption named, or in any way interested in the event of the said cause named in the caption.

In testimony whereof, I have hereunto set my hand this tenth day of April, in the year of our Lord one thousand eight hundred and seventy-eight, and of the Independence of the United States the 102nd.

JAMES A. BEATTIE,
U. S. Commissioner, Circuit Court of the U. S. for the District of Kentucky.

Also the Exhibits W. C. N., A, B, C, & D, referred to in the deposition of Wm. C. Nones, which are as follows, to wit:

112 W. C. N.

Statement showing the estate of W. H. Walker & Co. which came into the possession of Stephen E. Jones, assignee of W. H. Walker & Co., bankrupts.

Kind of property.		Value affixed in schedules of said bankrupts.	Am't realized by assignee.	Estimated value of outstanding debts.
Lot of ground & stable on China street in Vicksburg, Miss		7,140 03	Nothing.	2,500 00
Cash on hand		313 62	313 62	
Bills of exchange & promissory notes as follows:				
D. Beer, Winona, Miss	114 48	Worthless.	Worthless	Worthless.
" " " "	114 49	"	"	"
Jones & Dicks, Wellwood, Tenn	179 79	"	33 00	"
Bryan & Hutson, Denmark, Tenn	423 38	"	Worthless.	"
Mershon & Gastin, Grand Rapids, Mich	520 94	"	"	"
Fuller, A. R., Morrows Sta. Ga	76 95	76 95	Nothing.	Doubtful.
Dupree & Roden, Brooksville, Miss	225 70	225 70	225 70	
Neeley, S. L., New Albany, Miss	259 58	259 58	Nothing.	Doubtful.
Boyer, M. H., Sandersville, Ga	179 15	179 15	"	"
Singelfield, F. A., Louisville, Ga	158 82	158 82	147 20	Bal. worthless.
Radcliff & Lamb, Columbus, Ga	255 00	255 00	Nothing.	Doubtful.
Cromer, R. A., Chester, Miss	142 55	142 55	"	"
" " " "	33 50	33 50	"	"
Daniel, J. H., & Co., Millen, Ga	108 35	108 35	108 35	
Holmes, E. P., Winona, Miss	55 58	55 58	55 58	
McGrath, D. C., White Bear Lake, Minn	92 15	92 15	Nothing.	Doubtful.
Carey, P., Danville, Ills	689 90	689 90		
" " "	694 20	694 20	690 36	Bal. worthless.
Creech & Newsome, Nittman, Ga	230 02	230 02	230 02	
Johnson Neri, Morris Sta., Ga	45 40	45 40	45 40	
Dodds, J. F., Purdy, Tenn	152 95	152 95	Nothing.	Doubtful.
Clacins, C., Charleston, S. C	42 54	42 54	42 54	
Clower & Johnson, Forsythe, Ga	27 50	27 50	Nothing.	Doubtful.
Franklin, J. D., Tennessee, Ga	199 38	199 38	199 38	
Mathews, W. C. " "	21 50	21 50	21 50	
Valentine, J., Macon, Ga	35 25	35 25	35 25	
Denny, John, Shelbyville, Tenn	132 50	132 50	132 50	
Gordon & Co., Waynesboro, Ga	185 50	185 50	185 50	
Edwards & Baker, Eden, Ga	133 50	133 50	133 50	
Carried forward		11,631 12	2,599 40	2,500 00
113 Amounts brought forw'd		11,631 12	2,599 40	2,500 00
Stock in trade, consisting of whiskey, wines, brandy, & other liquors, &c., including rectifying apparatus & office furniture		83,772 46	66,016 70	5,500 00
Debts due upon open accounts:				
Alexander, J. B., Louisville, Ky	4 00	4 00	4 00	
Walker, W. M., St Paul, Minn	1,318 58	1,318 58	Nothing.	Worthless.
Dennis, Branson & Co., Indianapolis	342 25	342 25	299 44	Doubtful.
Miers & Co., Dallas, Texas	2,918 51	2,918 51	287 92	Bal. worthless.
Gardner & Co., Louisville, Ky	49,643 45	Worthless.	7,644 89	"
Richardson, James, Memphis, Tenn	17 83	17 83	Nothing.	Doubtful.
Gardner & Co., Louisville, Ky	1,030 67	Worthless.	Nothing.	Worthless.
Ansley, R. S., Chicago, Ills	330 34	"	"	Worthless.
Pollard, W., Linden, Wis	111 50	111 50	"	Doubtful.
Palmer, M. E., & Co., Indianapolis, Ind	50 00	Worthless.	"	Worthless.
W. H. Lee & Son, Cowpens, Ga	24 95	24 75	"	"
Farmers & Monk, Crawfordsville, Ga	160 63	160 63	"	Doubtful.
J. V. Hutton, Emmineuce, Ky	101 75	101 75	"	"
Wood, Jno. P., Brownsville, Tenn	53 83	53 83	"	"
F. Kirkpatrick, Mineral Point, Wis	125 13	125 13	"	Worthless.
Flucker & Watson, Union Point, Ga	164 65	164 65	"	Doubtful.
Pond & Brown, Detroit, Mich	25 00	Worthless.	"	Worthless.
Anderson & Coleman, Talladega, Ala	1 52	"	"	"
Wilson, C. G., Milledgeville, Ga	157 13	157 13	"	"
Mooreton, Fred, Atlanta, Ga	226 45	226 45	"	Doubtful.
Cowburg & Lodge, Louisville	3 25	Worthless.	"	Worthless.
Lawther, R. R., & Co., Galveston, Texas	594 70	594 70	"	"
Wenzel & Hinkel, Lancaster, Wis	100 35	100 35	100 35	
Bresnan, John, Savanah, Ga	1,242 00	1,242 00	Nothing.	Worthless.
Brantley, T. M., Forsythe, Ga	48 14	48 14	"	"
Turner, H. O., Clinton, Mo	49 70	49 70	"	"
Ellis, Bagby & Co., Jefferson, Texas	245 90	Worthless.	"	"
Sullivan & McKenna, Waco, Texas	280 49	"	"	"
Cole & Billingsley, Marion, Ala	257 50	257 50	"	"
McClanahan, L. B., Cleburne, Texas	1,603 55	1,603 55	"	"
Am't carried forward		105,356 85	76,862 70	8,000 00

Statement showing the estate of W. H. Walker & Co., &c.—Continued.

Kind of property.		Value affixed in schedules of said bankrupts.	Am't realized by assignee.	Estimated value of outstanding debts.
114 Am'ts brought forwaad		105,356 85	76,862 70	8,000 00
McClanahan Bros & Co., Clerburne, Texas	1,286 55	1,286 55	Nothing.	Worthless.
Dignon, N., Lansing, Iowa	109 00	109 00	"	"
Hatfield, Boyd & Co., San Francisco, Cal	1,100 00	Worthless.	"	"
Collins, T., Plattsville, Wis	41 65	"	"	"
Demuth, John, Mineral Point, Wis	100 70	100 70	"	"
McCowan, T. P. S., Towash Village, Texas	225 88	Worthless.	"	"
McElmurray, P. J., Rutherford St'n, Tenn	66 25	"	"	"
Trenier, R., Windsor, Mo	50 02	50 02	"	Doubtful.
Duke, Basil, Louisville, Ky	9 50	9 50	9 50	"
Walworth, Silas, Stevens Point, Wis	45 62	45 62	Nothing.	Doubtful.
Duncan & Cole, Uniontown, Ala	213 40	Worthless.	"	Worthless.
Wetmore, S., Patch Grove, Wis	62 25	62 25	"	Doubtful.
Dyke, G. H., Lone Rock, Wis	71 95	Worthless.	"	Worthless.
Keith, N., & Son, Stevensville, Texas	83 80	83 80	"	"
Meno & Sloan, Wausau, Wis	6 21	Worthless.	"	"
Geo. L. Page, Henryville, Ind	4 50	4 60	4 50	"
O'Connor & Rafferty, Birmingham, Ala	43 25	43 25	Nothing.	Doubtful.
Dunkin, Elias, Hurontown, Ala	397 50	Worthless.	"	Worthless.
Tillman, Wm., Louisville, Ky	12 80	12 80	12 80	"
Evans, H. W., Taborville, Mo	129 35	129 35	Nothing.	Doubtful.
Gimblin, M., Bloomington, Mo	55 50	55 50	"	Worthless.
Stinson, J. A., Jacksonport, Ark's	291 60	291 60	"	Doubtful.
D. & H. Stiff, McKinney, Texas	800 55	800 55	"	"
Findley, J. J., Dallas, Texas	1,451 33	Worthless.	"	Worthless.
Tutt, H. C., Papensville, Mo	287 86	287 86	"	"
Brown, Dan'l, Brascobel, Wis	60 25	60 25	"	"
Keater, T. E., Glen Rose, Texas	44 25	44 25	"	"
Simpson, D. H., Batesville, Miss	297 60	297 60	"	"
Bell, D. B., & Co., Greenville, Miss	142 78	Worthless.	"	"
Brandon, J. H., Fort Worth, Texas	229 95	229 95	"	"
Stewart, T. J., & Co., Pilot Point, Texas	277 25	277 25	"	Doubtful.
Kernaghan, H., Brandon, Miss	191 30	191 30	"	"
Franks, T. B. & Co., Macon, Miss	183 38	183 38	"	Worthless.
Rogers, T. J., Pontotoc, Miss	81 32	81 32	"	"
Am'ts carried forward		110,095 00	76,889 50	8,000 00
115 Am'ts brought forward		110,095 00	76,889 50	8,000 00
McLaughlin, P. R., Prairie Du Chein, Wis	233 50	233 50	Nothing.	Worthless.
McIvor, Hugh, Highland, Wis	53 55	53 55	"	"
Welsch & Lockett, Radsfordville, Ala	129 00	129 00	"	"
O'Dawd, John, Mineral Point, Wis	6 00	6 00	"	"
Mabbott, J. R., Helena Sta., Wis	98 15	98 15	"	Doubtful.
Mercer, D., & Co., Brownington, Mo	48 33	Worthless.	"	Worthless.
Towsley, A. W., Lane Rock, Wiss	64 00	64 00	"	Doubtful.
McGorman, Dan'l, Keokuk, Iowa	435 85	435 85	"	"
Hedrix, W. S., Memphis, Tenn	47 25	47 25	"	Worthless.
Mitchell, J. & P., Plainfield, Wis	87 25	87 25	"	"
T. A. Kerley, agt., Brownsville, Tenn	162 63	162 63	"	"
Ryan & Evans, Louisville	11 00	Worthless.	"	"
Childs, R. T., Hazeldell, Texas	176 35	176 35	"	Doubtful.
Wheeler & Dartfield, Detroit, Mich	2,996 70	Worthless.	"	Worthless.
Barrett, Wm. F., Louisville	5 25	5 25	"	Offset.
Fannin, Jno. A., Windsor, Mo	87 80	87 80	"	Worthless.
Claxton, W. H., Stanton Depot, Tenn	513 25	513 25	"	Doubtful.
Metcalfe, R., Montfort, Wis	150 50	150 50	"	Worthless.
Gillen, M., Fort Scott, K's	82 25	82 25	"	Doubtful.
Morrison, John, Sedalia, Mo	7 90	7 90	"	"
Paradis, L., Warsaw, Wis	76 25	76 25	"	Worthless.
Mitchell, W. R., Arrow Rock, Mo	281 00	281 00	281 00	"
Humasson, W. S., St. Paul, Minn	106 85	106 85	Nothing.	Doubtful.
Walker, Geo., Fisherville, Ky	23 35	23 35	"	Worthless.
Chesterfield, Geo., Mineral Point, Wis	26 90	26 90	"	"
Lewis, W. H., Lewis Sta., Mo	26 50	26 50	"	"
Ream, James, Greenville, Mo	131 10	131 10	"	"
Kelly, James, Sedalia, Mo	75 18	75 18	"	"
Simon, M., & Bro., Landsing, Iowa	87 75	87 75	"	"
John Cawein & Co., Louisville, Ky	1,392 65	1,392 65	"	"
W. H. Smith, Tulip, Ark's	91 20	91 20	"	"
Procter, D. G., & Co., Forsythe, Ga	96 91	96 91	"	"
Byington, Geo., Valley Junc., Wis	28 98	28 98	"	Doubtful.
Edmonson & Bro., Griffin, Ga	408 40	Worthless.	32 93	Bal. worthless
McVey & Newmeyer, Highland, Wis	91 50	91 50	Nothing.	Worthless.
		114,971 60	77,203 43	8,000 00

Statement showing the estate of W. H. Walker & Co., &c.—Continued.

Kind of property.		Value affixed in schedules of said bankrupts.	Am't realized by assignee.	Estimated value of outstanding debts.
116 Am'ts brought forward		114,971 60	77,203 43	8,000 00
Harrison and Woodruff, Macon, Ga	566 48	566 48	Nothing.	Worthless.
Wright, W. A., & Son, Barnesville, Ga	13 90	Worthless.	"	"
Figuette, W. F., & Bro., Rockville, Mo	130 25	130 25	130 25	
Field, D. & R. H. " "	35 00	35 00	35 00	
Camp & Gilreach, Atlanta, Ga	1,610 71	Worthless.	Nothing.	Worthless.
Proudfit, A., att'y, Macon, Ga	25 00	"	"	"
Deming, C. C., Syracuse, N. Y	225 75	225 79	"	"
Cotton, S. J., & Co., Windsor, Mo	73 75	73 75	73 75	
Thompson, G. H., Greensboro', Ga	250 25	250 25	Nothing.	Worthless.
Ausley, A. C., Mineral Point, Wis	1,382 90	1,382 90	"	Doubtful.
S. Duppler. " " "	33 05	33 05	33 05	
Duncan, J. M., Louisville, Ky	845 83	845 83	Nothing.	Doubtful.
Ball, W. D., Highland, Wis	75 50	75 50	"	Worthless.
H. M. Bond & Co., Sherman, Texas	812 24	812 24	"	"
Huppschmidt, C. W., Lansing, Iowa	37 00	37 00	"	"
McCarville, P., Mineral Point, Wis	92 25	92 25	"	Doubtful.
Hammer, Otto, Hillsboro', Wis	45 95	45 95	15 00	Bal. "
Lawrence & Weichelbaum, Savanah, Ga	975 46	975 46	Nothing.	Worthless.
Jno. A. Wood, Louisville, Ky	49 65	49 65	49 65	
Berger, Chas., Sedalia, Mo	32 13	32 13	Nothing.	Worthless.
Dulaney, J. P., Muscoda, Wis	26 93	26 93	"	"
Thos. Thompson, Avoca, Wis	99 61	99 61	"	Doubtful.
Moody, A., & Co., Montgomery, Ala	489 83	Worthless.	"	Worthless.
Ohweiller, Jacob, Fort Atkinson, Wis	42 75	42 75	"	"
Caudale, T. H., La Grange, Ga	498 95	498 95	"	"
Hersch, W. M., Fort Valley, Ga	34 25	34 25	"	Doubtful.
Thies, John, Mineral Point, Was	109 28	109 28	109 28	
McKenzie, J. C., Eufala, Ala	1,251 87	Worthless.	Nothing.	Worthless.
Mullen & Yenk, Mineral Point, Wis	151 90	151 90	"	Doubtful.
Shuleman, Goethe & Wall, Montgomery, Ala	1,204 00	Worthless.	"	Worthless.
Lockwood, H. H., Plattsville, Wis	21 25	21 25	"	"
Green, T. D., Syracuse, N. Y	601 33	601 33	102 00	Bal. "
Morton, J. M., Milwaukee, Wis	111 65	Worthless.	Nothing.	Worthless.
Rawlett & Lebalutt, Eufala, Ala	111 27	"	"	"
Am'ts carried forward		122,221 33	77,751 41	8,000 00
117 Am'ts brought forward		122,221 33	77,751 41	8,000 00
Lynch, T. B., Albany, N. Y	621 14	621 14	33 27	Bal. worthless.
Bayer, M. H., Sandersville, Ga	318 19	318 19	Nothing.	Doubtful.
Arnold F. Washington, Ga	167 88	167 88	"	"
Watkins, C. C., Dodgeville, Wis	105 60	105 60	"	Worthless.
Deese, J. Z. & Co., Toomsboro', Ga	140 62	140 62	140 62	
Dumphy, W. H., Washington, Ga	21 29	21 29	Nothing.	Worthless.
Schnalacker & Selig, Indianapolis, Ind	70	70	"	"
Kelly, Wm., Plattsville, Wis	64 95	64 95	"	Doubtful.
Hartredge, J., Savannah, Ga	40 00	40 00	"	Worthless.
Stokes, Jno. M., Louisville, Ky	272 45	272 45	"	"
Smith, John, Memphis, Tenn	1,148 88	Worthless.	"	"
Mosely, D. R., Danielsville, Ga	115 63	115 63	"	Doubtful.
Atchinson, J. L., Memphis, Tenn	51 12	51 12	"	Worthless.
Parton, L., Memphis, Tenn	35 68	35 68	"	Doubtful.
Tryon, A. M., Prairie Du Chien, Wis	107 05	107 05	"	"
Lewis, Chas. A., Louisville, Ky	136 00	136 00	"	"
Donnelly, F. X., Columbus, Ga	49 97	49 97	"	"
Guard, C. E., New Haven, Ct	511 88	Worthless.	"	Worthless.
Ware, Marion, Walnut Sta., Ks	42 25	42 25	"	Doubtful.
Stringfield, Wood, Louisville, Ky	128 00	128 00	"	"
Kaye, Geo., " "	200 00	200 00	"	"
Churchill, H. C., Windsor, Mo	168 50	168 50	168 50	
Welsch, E., Marion, Ala	1,051 65	1,051 65	Nothing.	Worthless.
Mitchell, H., Sedalia, Mo	102 37	102 37	95 00	Bal. worthless.
Phillips, J. W., Jacksonport, Ark	10 10	Worthless.	Nothing.	Worthless.
Ganies & Gunnu, Springfield, Ind	54 00	54 00	54 00	
Rhodes, N. E., Athens, Ga	522 28	522 28	Nothing.	Worthless.
McGee, Theo., Louisville, Ky	4 00	4 00	4 00	
Hass, G. W., Milledgeville, Ga	106 70	106 70	Nothing.	Doubtful.
Mitchell, S. D., Athens, Ga	223 30	223 30	"	Worthless.
Roswald & Abraham, Montgomery, Ala	274 40	274 40	27 19	Balance worthless.
Gregg, Ford, Shreveport, La	279 88	279 88	Nothing.	Worthless.
Adams & Fessenden, Boston, Mass	429 28	429 28	"	"
Burry, J. M., Athens, Ga	190 60	190 60	85 00	Bal. worthless
Am'ts carried forward		128,246 81	78,788 27	8,000 00

Statement showing the estate of W. H. Walker & Co., &c.—Continued.

Kind of property.		Value affixed in schedules of bankrupts.	Amount realized by assignee.	Estimated value of outstanding assets.
118	Am'ts brought forward	128,246 81	78,788 27	8,000 00
Drake, Dal., Johnston, Mo	175 15	175 15	33 67	Bal. doubtful.
Langer, John, Detroit, Mich	78 00	78 00	66 08	Bal. worthless.
Richardson & Smith, Papinsville, Mo	52 82	52 82	52 82	
O'Bannon, John W., Louisville, Ky	1 50	1 50	Nothing.	Worthless.
Ellis, W. D., Atlanta, Ga	25 00	25 00	"	"
Finks, J. E., Calhoun, Mo	186 69	186 69	55 00	Bal. doubtful.
Miller, H. C. & Co., Booneville, Mo	342 46	342 46	25 00	" "
Morrison, D. F., Boston, Mass	326 00	326 00	Nothing.	Doubtful.
Mathews, F. H., Baldwyn, Miss	108 50	108 50	"	"
Kaye & Craig, Louisville	120 00	120 00	120 00	
Brophy, Thos., Boston, Mass	854 03	854 03	170 80	Bal. worthless.
Mars & Durham, Baldwin, Miss	1 25	1 25	Nothing.	Worthless.
Whisenand, J., Osceola, Mo	321 80	321 80	"	Doubtful.
Davidson, A. C., Taborville, Mo	25 50	25 50	"	"
Rodway, T. F., Prairie Du Chein, Wis	230 40	230 40	"	"
Wood, J. A. & Bro., Roscoe, Mo	88 00	88 00	86 75	Bal. worthless.
Cole, A. V., Satillo, Miss	382 73	382 73	Nothing.	Worthless.
Loney, L., Shell City, Mo	177 46	177 46	177 46	
Sullivan & Harris, Sedalia, Mo	298 66	298 66	271 72	Bal. worthless.
Terrill & Lingley, La Grange, Ga	5 00	Worthless.	Nothing.	Worthless.
Curry, W. N., Mineral Point, Wis	13 75	13 75	"	Doubtful.
David Bros., Muscoda,	99 25	99 25	79 50	Bal. worthless.
Wetherrell, Geo., Pontoeto, Miss	543 12	543 12	Nothing.	Worthless.
Stiff, John D., McKinney, Texas	38 75	38 75	31 00	Bal. worthless.
Webber, David, Lancaster, Wis	64 25	64 25	64 25	
Anderson, G. G. & Bro., New Albany, Miss	158 25	158 25	Nothing.	Doubtful.
Bacon, Frank, Bridgeport, Wis	34 75	34 75	"	"
Blackway, Thos., Highland, Wis	122 85	122 85	"	Worthless.
Martin, W. E., Nevada City, Mo	197 93	197 93	197 93	
Wachter, Geo., Prairie du Chien, Wis	105 85	105 85	97 75	Bal. worthless.
Dakin, W. H. & Co., Sedalia, Mo	396 96	396 96	78 78	" doubtful.
Brooks, John, Fulton, Ark's	252 80	252 80	252 80	
Restern, F. S., Boston, Mass	180 50	180 50	180 50	
Porter, C. C., Okalona, Miss	50 42	50 42	Nothing.	Doubtful.
	Am'ts carried forward	134,302 19	80,832 95	8,000 00
119	Amounts brought forward	134,302 19	80,832 08	8,000 00
Finnegan, Jas., Logansport, Ind	263 83	263 83	Nothing.	Worthless.
Tidwell, A. J., Carrollton, Miss	107 13	107 13	"	Doubtful.
Dye & Atwood, Lamar's, Mo	84 25	84 25	"	"
Layton, L. D., Mt. Sterling, Wisconsin	110 60	110 60	Nothing.	Doubtful.
Anderson, J. W., Papinsville, Mo	31 50	31 50	31 50	
Cobb, A. C. & Son, Appleton City, Mo	323 71	323 71	78 13	Bal. doubtful.
Henry, W. M., Rockville, Mo	41 25	41 25	10 00	" "
Guthridge, W. H., Calhoun, Mo	74 80	74 80	38 85	" "
Harris, L. M., West Point, Ga	12 10	12 10	Nothing.	Worthless.
Crow, W. V., Cleveland, Ohio	777 58	777 58	"	Doubtful.
Browning, W. G. & Co., Appleton City, Mo	257 31	257 31	257 31	
Packett & Hays, Lamonte, Mo	194 35	194 35	194 35	
Harris & Hazleton, Booneville, Mo	175 06	175 06	40 00	Balance doubtful.
Smith, E. H., Prestonsville, Ky	42 45	42 45	Nothing.	Doubtful.
Fry, H. B. & Co, Boston, Mass	306 56	306 56	"	Worthless.
Davison, C. G., Louisville	31 00	31 00	31 00	
Miller, Jno. W. & Co., Warsaw, Wis	41 60	41 60	Nothing.	Worthless.
Minor, O. E., Mineral Point, Wis	109 28	109 28	"	Doubtful.
Weaver, Thos., Mifflin, Wis	30 60	30 60	"	"
Crockett, H. E. & Co., Sedalia, Mo	80 17	80 17	41 59	Bal. doubtful.
Mellein, Jacob, Montrose, Mo	405 90	405 90	130 00	" "
Stout & McKay, Indianapolis, Ind	100 44	100 44	Nothing.	Doubtful.
Zelweger & Arnold, Nevada City, Mo	183 96	183 96	183 96	
Mulcahy, Cath., Mineral Point, Wis	111 50	111 50	111 50	
Menefee, R. J., Louisville, Ky	2 00	2 00	2 00	
Heyer, Peter " "	1 70	1 70	Nothing.	Worthless.
Hall, James " "	3 00	3 00	"	"
Conway & Penquite, Lemonte, Mo	94 84	94 84	84 33	Bal. worthless.
Pence, David, Franklin, Ind	1 50	1 50	1 50	
Ross, Bernard, Rockville, Mo	83 25	83 25	30 00	" doubtful.
Ryan, J., St. Louis, Mo	76 70	76 70	Nothing.	" "
Doyle, Michael, Belmont, Wis	66 75	66 75	40 00	" "
Fritz, Casper, Fennimore, Wis	92 25	92 25	92 25	
Logan & Reaves, Atlanta, Ga	429 83	429 83	Nothing.	Doubtful.
	Am't	139,050 94	82,314 60	8,000 00

Statement showing the estate of W. H. Walker & Co., &c.—Continued.

Kind of property.		Value affixed in schedules of bankrupts.	Amount realized by assignee.	Estimated value of outstanding assets.
120 Am'ts brought forward		139,050 94	82,314 60	8,000 00
Roberts, Frank, Louisville, Ky	21 50	21 50	Nothing.	Worthless.
Strain, Wallace, " "	12 25	12 25	"	Offset.
Rand Bros., New York City	135 91	135 91	135 91	
Coleman, J. M., Louisville, Ky	8 00	8 00	8 00	
Malone, H. & V., Fort Scott, Ks	295 00	295 00	50 00	Bal. doubtful.
McCannon & Wetherill, Pontotoc, Miss	384 92	384 92	Nothing.	Worthless.
Terrell, Mark, Mineral Point, Wis	127 65	127 65	"	Doubtful.
Thompson, G. W. & Co., St. Louis, Mo	171 85	171 85	"	Worthless.
Stafford & Fatrick, Windsor, Mo	81 13	81 13	81 13	
Chambers, J. B., St. Louis, Mo	17 75	17 75	Nothing.	Doubtful.
Holmes, E. D., Wiona, Miss	54 00	54 00	54 00	
McGrath, D. C., White Bear Lake, Minn	334 96	334 96	Nothing.	Doubtful.
Holmes, J., & L. W. Rasdell, Macon, Ga	563 08	563 08	"	Worthless.
Jones, James, Danville, Wis	28 25	28 25	"	Doubtful.
Loughridge, J. L., Verona, Miss	125 63	125 63	125 63	
Rowan, J. B., Baldwynn, "	137 45	137 45	Nothing.	Doubtful.
Hurley, J. R., Spring Green, Wis	18 75	18 75	"	"
Robinson, R. D., Richland Centre, "	31 50	31 50	"	"
Murphy, Geo., Tupelo, Miss	14 00	14 00	14 00	
Wright, John, Lancaster, Wis	101 50	101 50	101 50	
Going, Chas., Lowell, Mass	449 75	449 75	449 75	
Coughlin, W. J., Louisville, Ky	50 60	50 60	50 60	
Walton & Walker, Booneville, Miss	34 03	34 03	34 03	
Craig, W. H., Kenyon, Arks	212 75	212 75	212 75	
R. M. Cunningham, Louisville, Ky	16 50	16 50	Nothing.	16 50
Dapere, J. P., " "	153 38	153 38	153 38	
Granger, W. H., " "	4 50	4 50	4 50	
Speed, John, & Bro., " "	1 10	1 10	1 10	
Ball & Mason, Cleveland, O	25 00	25 00	Nothing.	Worthless.
Roll, Chas., & Co., Sedalia, Mo	263 67	263 67	260 52	
Sherrod, W. J., & Son, Medville, Ga	663 48	663 48	Nothing.	Doubtful.
Adams & Bean, Little Rock, Ark	690 51	Worthless.	"	Worthless.
Sale & Murphy, Shreveport, La	2,296 31	Worthless.	"	Worthless.
		143,590 78	84,051 40	8,016 50
121 Am'ts brought forward		143,590 78	84,051 48	8,016 50
Stocks in incorporated companies:				
Louisville Industrial Exposition stock,	par value	1,000 00	200 00	Nothing.
Planter's Nat'l Bank stock, balance unpaid,	" "	950 00	Nothing.	Nothing.
Merchants' Insurance Co.,	" "	2,500 00	2,150 00	"
18 shares Shreveport Gas Company stock,	cost	1,781 74	Nothing.	720 00
Louisville Insurance Company	"	1,460 90	1,220 00	Nothing.
Totals		151,282 52	87,621 40	8,736 50

MEMO.—**The value of the estate as given in the schedules of bankrupts ($151,282.52) includes notes and accounts amounting to 30,626, which are classified in said schedules as "doubtful."**

The amount realized from the assets by the assignee to date is	**87,621 40**
The estimate value of the assets outstanding is	**8,736 50**
Value of estate in hands of assignee	**$96,357 90**

In the circuit court of the United States for the district of Kentucky.

S. E. JONES, ASSIGNEE OF FRED. K. WALKER, &c., *vs.* W. H. WALKER & CO. } No. 5192.

Exhibit W. C. N. with the annexed deposition of William C. Nones,

taken for complainant before me in the above-entitled cause, April 1st, 1878.

JAMES A. BEATTIE,
Com'r Cir. C't U. S. Dist. Ky.

122 W. C. N.—A (A).

Accounts open on the books of W. H. Walker & Co., appearing as assets, which were past due and unpaid, Dec. 31, 1872.

Ellis Bagby & Co., Jefferson, Texas.....	245 90
Ledger B, 31; ledger C, 227.—This is a balance due upon bill of m'd'se sold Nov. 16, '71, @ 90 days.	
Sullivan & McKenna, Waco, Texas.....	280 49
Ledger B, 37; ledger C, 229.—This is a balance due upon bill of m'd'se sold Dec. 2, '71, @ 90 days. It was charged to profit & loss Dec. 1, 1874 (folio 130, day-book D), and under same date (folio 147, same day-book) credited to profit & loss and charged back to Sullivan & McKenna.	
Cole & Billingsley, Marion, Ala.....	192 75
Ledger C, 271.—This is two bills of m'd'se sold Oct. 8, '72, and Oct. 22, '72, @ 60 days, charged to profit & loss, credited to profit & loss, & charged back to Cole & Billingsley at same time as Sullivan & McKenna.	
L. B. McClenahan, Texas.....	1,092 45
Ledger B, 117.—This is m'd'se sold August 12, '71, 64.05, and cash Nov. 6, '71, 689.40, and cash during 1872, 339.00, charged & credited to profit & loss, & charged back to L. B. McClenahan same time as Sullivan & McKenna.	
123 McClenahan Bros. & Co., Granbury, Texas.....	1,286 55
Ledger B, 147.—This is a balance due on bill of m'd'se sold Nov. 4, '71, charged & credited to profit & loss, & charged back to McClenahan Bros. & Co. same time as Sullivan & McKenna.	
Am't carried forward.....	3,098 14
Am't brought forward.....	3,098 14
Heathfield, Bogel & Co., San Francisco, Cal.....	1,100 00
Ledger B, 376.—This is an account brought from ledger A, Feb'y 1, '71, charged & credited to profit & loss, & charged back to Heathfield, Bogel & Co. same time as Sullivan & McKenna.	
T. P. S. McCowan, Towash Valley, Texas.....	225 88
Ledger B, 505; ledger C, 303.—This is a balance upon bill of m'd'se sold July 15, '71, charged & credited to profit & loss, and charged back to T. P. S. McCowan same time as Sullivan & McKenna	
R. Trenier, Windsor, Mo.....	50 02
Ledger C, 327.—This is a balance on bills Aug. 17 & 19th, 1872, charged and credited to profit & loss, and charged back to R. Trenier same time as Sullivan & McKenna.	
	4,474 04
Total.....	$4,474 04

Cir. c't U. S. dist. Ky. S. E. Jones, ass'ee F. R. Walker & Co., vs. W. H. Walker & Co., No. 5192. Exhibit (W. C. N., A) or (A) with
124 the annexed deposition of William C. Nones taken for complainant before me in the above-entitled cause, April 3d, 1878. James A. Beattie, com'r cir. c't U. S. dist. Ky.

W. C. N.—B (B).

Accounts open on the books of W. H. Walker & Co., appearing as assets, which were past due and unpaid, Dec. 31st, 1873.

David Beer, Winona, Miss..... 199 94
Ledger C, 467.—This is for m'd'se sold on 90 days' time, Ap'l 18, '73, & May 22, '73. 30.03 interest was added to above amount M'ch 28, '74, and two notes taken for $114.48 & 114.49, @ 9 & 12 mos. These notes remain unpaid.

R. S. Ausley..... 330 34
Ledger C, 76 & 77.—This is an account made during 1873. It was charged to profit & loss, Dec. 1, 1874, folio 130 day-book (D), and under same date (folio 147 same day-book) credited to profit & loss, & charged back to R. S. Ausley.

Cole & Billingsley, Marion, Ala..... 64 75
Ledger C, folio 251.—This is a bill of m'd'se sold Nov. 16, '72, on 60 days' time, charged & credited to profit & loss, & charged back to Cole & Billingsley same time as R. S. Ausley.

125 L. B. McClanahan, Texas..... 286 00
Ledger C, 266.—This is for cash drawn during 1873, charged & credited to profit & loss, and charged back to McClanahan, same time as R. S. Ausley.

Am't carried forward..... 881 03

Am't brought forward..... 881 03

Dunkin & Cole, Uniontown, Ala..... 213 40
Ledger C, 400.—This is for mdse. sold Aug. 19, and Sept. 15, '73, on 60 days' time, charged and credited profit & loss, & charged back to Dunkin & Cole, same time as R. S. Ansley.

N. Keith & Son, Ste ensville, Texas..... 83 80
Ledger C, 422.—This is a balance on bill mdse. sold Jan'y 7, '73, @ 90 days.

O'Connor & Rafferty, Birmingham, Ala..... 43 25
Ledger C, 448.—This is a balance on bill mdse. sold July 1, '73, @ 90 days, charged & credited to profit & loss, & charged back to O'Connor & Rafferty, same time as R. S. Ausley.

M. Gimblin, Bloomington, Mo..... 55 50
Ledger C, 465.—This is a balance on bill mdse. sold July 1, '73, @ 90 days, charged & credited profit & loss, & charged back to M. Gimblin, same time as P. S. Ausley.

J. A. Stinson, Jacksonport, Arks..... 291 60
Ledger C, 476.—This is a balance on bill of mdse.
126 sold May 17, '73, @ 4 mo's, charged & credited profit

& loss, & charged back to J. A. Stinson, same time as R. S. Ausley.

Carried forward	1,640 53
Brought forward	1,640 53
D. & H. Stiff, McKinney, Texas	800 55
Ledger C, 490.—Bills of mdse. sald June 24, '73, and Sept. 22, 1873, @ 90 days.	
T. E. Keeter, Glenrose, Texas	44 25
Ledger C, 512.—Bill of mdse. sold Sept. 9th, 1873, @ 90 days, charged and credited to profit & loss, & charged back to T. E. Keeter, same time as R. S. Ausley.	
D. H. Simpson, Batesville, Miss	297 60
Ledger C, 514.—Bill of mdse. sold Sept. 11th, 1873, @ 90 days, charged & credited to profit & loss, & charged back to D. H. Simpson, same time as R. S. Ansley.	
J. T. Stuart & Co., Pilot Point, Texas	277 25
Ledger C, 520.—Bill of mdse. sold Sept. 19th, 1873, @ 90 days.	
H. Kernaghan, Brandon, Miss	191 30
Ledger C, 521.—Bill of mdse. sold Sept. 19th, 1873, @ 90 days, charged & credited to profit & loss, & charged back to K. Kernghan, same time as R. S. Ansley.	
P. R. McLaughlin, Prairie du Chein, Wis	233 50
127 Ledger C, 531.—Bill of mdse. sold Oct. 4th, 1873, @ 60 days, charged & credited to profit & loss, and charged back to P. R. McLaughlin, same time as R. S. Ansley.	
Carried forward	3,484 98
Brought forward	3,484 98
Hugh McIver, Highland, Wis	53 55
Ledger C, 536.—Bill of mdse. sold Oct. 13, '73, @ 60 days, charged & credited to profit & loss, and charged back to Hugh McIver, same time as R. S. Ansley.	
James Ream, Green Ridge, Mo	131 10
Ledger C, 627 : Ledger C, 442.—Balance on bills of mdse. sold Aug. 12 & 19th, 1873, @ 60 & 90 days.	
Sale & Murphy, Shreveport, La	2,296 31
Ledger C, 363.—Balance on bill of mdse. sold Feb'y 4, '73, @ 4 mo's.	
	5,965 94
Total	5,965 94

Circuit c't U. S., dist. Ky.; S. E. Jones, ass'ee; F. K. Walker, &c., vs. W. H. Walker & Co., &c., No. 5192. Exhibit W. C. N., B. or (B.), with the annexed deposition of Wm. C. Nones, taken for complainant before me in the above-entitled cause, April 3d, 1878. James A. Beattie, com'r cir. c't U. S., dist. Ky.

128 W. C. N.—C (C).

Accounts open on the books of W. H. Walker & Co. appearing as assets, which were past due and unpaid Dec. 31st, 1874.

Jones & Ricks	146 79
Ledger C, folio 591.—This is a note, d'd Oct. 1st, 1874, given for balance due on bill of mdse. sold March 7th, 1874, @ 60 days, payable 1 day after date.	
Bryan & Hutson, Denmark, Tenn	423 28
Ledger C, folio 568.—This is a note, d'd May 15th, 1874, payable 1 day after date, given for mdse. sold Jan'y 28 & M'ch 7th, 1874, @ 90 days.	
M. C. Palmer	50 00
Ledger C, folio 92—cash book ✗ 2, folio 227—shows that this was an att'y's fee paid Palmer for settlement a/c Palmer, Cole & Stout, Jan'y 14th, 1874. It was charged to profit & loss, Dec. 1st, 1874 (folio 130, Day Book D), and under same date (folio 147, same day book) credited to profit & loss, & charged back to M. C. Palmer.	
David Beer, Winona, Miss	30 03
Ledger C, folio 467.—This is interest included in notes d'd M'ch 28th, 1874.	
J. V. Hutton, "salesman"	101 75
129 Ledger C, folio 122.—This was mdse. and cash paid May 14th and July 15, 1874. It was charged & credited to profit & loss, & charged back to J. V. Hutton, same time as M. E. Palmer.	
Am't carried forward	751 85
Brought forward	751 85
Pond & Brown, Detroit, Mich	25 00
Ledger C, 163; Cash book 2, 333.—This is for an attorney's fee paid Dec. 10th, 1874.	
L. B. McClenahan	225 10
Ledger C, 266.—This is for cash drawn during 1874. It was charged & credited to profit & loss, & charged back to L. B. McClenahan same time as M. E. Palmer.	
P. J. McElmurray, Rutherford Station, Tenn	66 25
Ledger C, 305.—This is a bill of mdse. sold Sept. 21st, 1874, @ 30 & 60 days.	
Silas Walsworth, Stevens Point, Wis	45 62
Ledger C, 373; Ledger D, 307.—This is a balance due upon bill of mdse. sold May 16, '74, @ 90 days.	
Elias Dunkin, Uniontown, Ala	397 50
Ledger C, 452.—This is a balance due upon bills of m'd'se sold from M'ch 18, '73, to M'ch 12, '74, charged & credited to profit & loss, and charged back to Elias Dunkin, same time as M. E. Palmer.	
J. J. Fendley, Dallas, Texas	1,451 33
130 Ledger C, 494.—This is a balance upon bills of m'd'se sold Dec. 11 and 31, 1873, @ 60 and 90 days, and 4 months. It was charged & credited to profit & loss,	

& charged back to J. J. Fendley same time as M. E. Palmer.

	Carried forward	2,962 65
	Brought forward	2,962 65
	H. C. Tutt, Papinsville, Mo	287 86
	Ledger C, 496.—This is for m'd'se sold Dec. 9th, 1873, Jan'y 12, & Feb'y 10, '74, @ 90 days.	
	Daniel Brown, Rascobel, Wis	60 25
	Ledger C, 501.—This is a balance on bill of m'd'se sold Nov. 25, '73, @ 90 days.	
	D. B. Bell & Co., Greenville, Miss	142 78
	Ledger C, 518.—This is for m'd'se sold Sept. 16 and Nov. 5, 1873, @ 90 days.	
	J. H. Brandon, Fort Worth, Texas	229 95
	Ledger C, 519.—This is a bill of m'd'se sold April 16th, 1874, @ 90 days.	
	T. B. Franks & Co., Macon, Miss	183 38
	Ledger C, 522.—This is for m'd'se sold April 27 and July 7th, 1874, @ 90 days, charged & credited to profit & loss, & charged back to T. B. Franks & Co. same time as M. E. Palmer.	
	T. J. Rogers, Pontotoe, Miss.	81 32
	Ledger C, 530.—This is a balance on bills of m'd'se sold Oct. 3 & Dec. 19th, 1873, charged and credited to profit	
131	& loss, & charged back to T. J. Rogers same time as M. E. Palmer.	
	Welsh & Lockett, Radfordsville, Ala	129 00
	Ledger C, 546.—This is a balance on bills of m'd'se sold from M'ch 2 to Dec. 14th, 1874.	
	Am't carried forw'd	4,077 19
	Brought forward	4,077 19
	Dr. C. Mercer, Brawnington, Mo	48 33
	Ledger C, 574.—This is a bill of m'd'se sold Feb'y 5, '74, on 60 days' time.	
	A. W. Tousley, Lonerock, Wis	64 00
	Ledger C, 580.—This is a ballance on bill of m'd'se sold Feb'y 18th, '74, @ 60 days.	
	W. S. Hedrix, Memphis, Tenn	47 25
	Ledger C, folio 585.—This is a balance on bill of m'd'se sold Feb'y 27, '74, @ 60 days. It was charged and credited to profit & loss, & charged back to W. S. Hedrix same time as M. E. Palmer.	
	J. & P. Mitchell, Plainfield, Wis	87 25
	Ledger C, 588.—This is a bill of m'd'se sold M'ch 3d, 1874, @ 90 days.	
	C. A. Kirby, agent, Brownsville, Tenn	162 63
	Ledger C, 588.—This is for m'd'se sold M'ch 5, '74, @ 60 days. It was charged and credited to profit & loss, & charged back to C. A. Kirby, ag't, same time as M. E. Palmer.	
132	Ryan & Evans, Louisville, Ky	11 00
	Ledger C, folio 594.—This is for m'd'se sold May 28th	

and July 21st, 1874. It was charged & credited to profit & loss, and charged back to Ryan & Evans same time as M. E. Palmer.

Am't carried forward	4,497 65
Amount brought forward	4,497 65
R. T. Childs, Hazeldell, Texas	176 35
Ledger C, 595.—Bill of M'ch 18th, 1874, @ 90 days. It was charged & credited to profit & loss, and charged back to R. T. Childs same time as M. E. Palmer.	
Wheeler & Garfield, Detroit, Mich	2,996 70
Ledger C, 597.—Bill of M'ch 23d, 1874, @ 4 & 5 months.	
W. H. Claxton, Stanton's Depot, Tenn	513 25
Ledger C, 606.—Bill of April 13th, 1874, @ 90 days. It was charged & credited to profit & loss, & charged back to W. H. Claxton same time as M. E. Palmer.	
M. Gibson, Fort Scott, Kansas	82 25
Ledger C, 612.—Bill of April 28th, 1874, @ 60 days.	
W. S. Hammason, St. Paul, Minn	106 85
Ledger C, 619.—Bill m'd'se sold @ 90 days from M'ch 24, '74. It was charged & credited to profit & loss, & charged back to W. S. Hamasson same time as M. E. Palmer.	
Geo. Chesterfield, Mineral Point, Wis	26 90
133 Ledger C, 623.—Bill of m'd'se sold June 26th, '74, @ 60 days.	
W. H. Lewis, Lewis Sta., Mo	26 50
Ledger C, 625.—Balance due upon bill of m'd'se sold Oct. 17, '74, @ 60 days.	
Am't carried forward	$8,426 45
Amount brought forward	8,426 45
M. Simon & Bro., Lansing, Iowa	87 75
Ledger C, 628.—Balance on bill m'd'se sold July 16, '74, @ 60 days.	
John Carvein & Co., Louisville, Ky	1,295 90
Ledger C, 279, 632.—This is a balance on bills of m'd'se sold from Sept. 13th, 1873, to Aug. 20th, 1874.	
Adams & Bein, Little Rock, Arks	690 51
Ledger C, 564.—This is a balance on bill of m'd'se sold M'ch 20, '74, @ 90 days. It was charged and credited to prof't & loss, & charged back to Adams & Bein, same time as M. E. Palmer.	
Total	$10,500 61

Cir. c't U. S., dist. Ky., S. E. Jones, ass'ee of F. K. Walker, &c., vs. W. H. Walker & Co., No. 5192. Exhibit W. C. N. "C." or (C.) with the annexed deposition of William C. Nones, taken before for complainant in the above entitled cause, April 3d, 1878. James A. Beattie, com'r cir. c't U. S., dist. Ky.

134 W. C. N.—D. (D.)

Accounts open on the books of W. H. Walker & Co., appearing as assets, which were past due and unpaid Dec. 31st, 1875.

Meishon & Gastin, Grand Rapids, Mich	520 94
Ledger C, 602.—This is a balance due upon 3 notes d'd April 3, 1875, @ 60 & 90 days. These notes were given for money advanced by W. H. Walker & Co. to enable Meishon & Gastin to meet their acceptance of W. H. Walker & Co. draft, d'd Dec. 1st, 1874, @ 4 months, which acceptance was given for mdse. sold Oct. 29th, 1874.	
W. H. Lee & Son, Conyers, Ga	24 75
Ledger C, 98.—Balance on bill mdse. sold Nov. 16, '74, 60 days.	
Farmer & Monk, Crawfordsville, Ga	160 63
Ledger C, 116.—Balance on bill mdse. sold Jan. 28, '75, 90 days.	
John P. Wood, Brownsville, Tenn	53 83
Ledger C, 137.—Mdse. sold Sept. & Oct., 1874, & Feb'y, 1875.	
F. Kirkpatrick, Mineral Point, Wis	125 13
Ledger C, 156.—Bal. on bill mdse. sold Jan. 11, '75, @ 90 days.	
Flucker & Watson, Unionpoint, Ga	164 65
Ledger C, 159.—Balance on bill mdse. sold M'ch 20, '75, @ 90 days.	
C. G. Wilson, Milledgeville, Ga	157 13
Ledger C, 179.—Mdse. sold Dec. 31st, 1874, @ 90 days.	
Am't carried forward	1,207 06
135 Amount brought forward	1,207 06
Fred. Moreton, Atlanta, Ga	226 45
Ledger D, 285.—Balance on bills mdse. sold July 21 & Oct. 6, '75, @ 90 days.	
R. R. Lawther & Co., Galveston, Texas	594 70
Ledger C, 375, 183.—Balance on bill mdse. sold Sept. 10, '74, @ 4 mos., closed by acceptance; acceptance discounted and taken up by W. H. Walker & Co.	
John Bresnan, Savannah, Ga	1,242 00
Ledger C, 189.—Bill of mdse. sold Jan'y 21st, 1875, @ 90 days.	
T. W. Brantley, Forsyth, Ga	48 14
Ledger C, 191.—Balance on bill mdse. sold Dec. 21st, 1874, @ 60 days.	
Sam'l Wetmore, Patch Grove, Wis	62 25
Ledger C, 397, D, 304.—Balance on bill mdse. sold Nov. 25th, 1874, @ 4 months.	
John A. Famin, Windsor, Mo	87 80
Ledger C, 601.—Balance on bills mdse. sold Aug. 11th & Nov. 4th, 1874.	
Robert Metcalfe, Monfort, Wis	150 50
Ledger C, 608.—Balance on bills mdse. sold Oct. 5th & Nov. 25, '74, @ 4 mos.	
L. Paradis, Wausaw, Wis	76 25

136 Ledger C, 615.—Bill mdse. sold Nov. 2d, 1874, @ 90 days.
James Kelly, Sedalia, Mo 75 18
Ledger C, 625.—Bill mdse. sold Nov. 4, '74, @ 90 days.

Am't carried forward 3,770 33

Am't brought forward 3,770 33
D. G. Proctor & Co., Forsythe, Ga 96 91
Ledger C, 108.—Bill mdse. sold Feb'y 1, '75, @ 60 days.
Geo. Boyington, Valley June, Wis 28 98
Ledger C, 176, D, 335.—Balance due on bill mdse. sold Feb'y 20th, 1875, @ 90 days.
Edmonson & Bro., Griffin, Ga 375 47
Ledger C, 80.—Balance due on bill mdse. sold Dec. 1st, '74, @ 90 days.
McVea & Newmeyer, Highland, Wis 91 50
Ledger C, 186, D, 340.—Balance due on bill mdse. sold M'ch 26, '75, @ 60 days.
Harrison & Wright, Macon, Ga 566 48
Ledger C, 191.—Bill mdse. sold Dec. 19, '74, @ 85 & 95 days.
W. A. Wright & Son, Bainesville, Ga 13 90
Ledger C, 215.—Bill mdse. sold M'ch 16, 1875, @ 60 days.
A. Proudfit, att'y at law, Macon, Ga 25 00
Ledger D, 361.—For costs in case vs. Harrison & Woodruff, as shown by cash book 2, folio 389.
137 G. H. Thompson, Greensboro', Ga 250 25
Ledger D, 367.—Bill mdse. sold May 19, 1875, @ 90 days.
W. D. Bull, Highland, Wis 75 50
Ledger D, 369.—Balance due on bill mdse. sold Aug. 5, '75, @ 60 days.

Am't carried forward 5,294 32

Brought forward 5,294 32
Lawrence & Weichselbaum, Savannah, Ga 975 46
Ledger D, 382.—Bills mdse. sold July 20, Aug. 10, & Sept. 7th, 1875.
Chas. Berger, Sedalia, Mo 32 13
Ledger D, 384.—Balance on bill mdse. sold July 12, 1875, @ 90 days.
A. Moog & Co., Montgomery, Ala 489 33
Ledger D, 396.—Bal. on bill mdse. sold Aug. 11th, '75, @ 90 days.
J. Ohweiller, Fort Atkinson, Wis 42 75
Ledger D, 397.—Balance on bill mdse. sold Aug. 13, '75, @ 90 days.
Shulman, Goelter & Weil, Montgomery, Ala 1,204 00
Ledger D, 405.—Balance on bill mdse. sold Aug. 26, '75, @ 90 days & 4 mos.
H. H. Lockwood, Platteville, Wis 21 25
Ledger D, 405.—Bill mdse. sold Aug. 31, '75, @ 60 days.
Rowlutt & Labulett, Eufala, Ala 111 27

Ledger D, 410.—Balance on bills mdse. sold Sept. 4 & 30, 1875, @ 60 days.

William Kelly, Platteville, Wis..... 64 95

138 Ledger D, 425.—Balance on bill mdse. sold Oct. 6th, 1875, @ 60 days.

J. Hartridge, att'y-at-law, Savannah, Ga..... 20 00

Ledger D, 430.—For costs suit vs. Lawrence & Weichselbaum, Oct. 23, '75.

Edgar Welsh, Marion, Ala..... 1,051 65

Ledger D, 473.—This amount past due and unpaid Dec. 31, '75.

Amount carried forw'd..... 9,307 11

Amount brought forw'd..... 9,307 11

Gardner & Co., Louisville, Ky..... 12,034 50

Ledger C, 277.—This amount due Dec. 31st, 1875.

$21,341 61

Circ't c't U. S., dist. Ky. S. E. Jones, ass'ee F. K. Walker &c., vs. W. H. Walker & Co., &c. No. 5192. Exhibit W. C. N., D. or (D.) with the annexed deposition of William C. Nones, taken for complainant before me in the above-entitled cause April 3d, 1878. James A. Beattie, U. S. cir. c't, dist. Ky.

The deposition of Fred. K. Walker, taken in behalf of the defendants, is as follows, viz:

Deposition of F. K. Walker.

139 In the United States circuit court for the district of Kentucky.

S. E. JONES, ASSIGNEE OF W. H. WALKER & CO.,
vs.
W. H. WALKER'S EX'ORS.

Deposition of Frederick K. Walker for defendants.

The deposition of Frederick K. Walker, taken on the 4th day of May, 1877, at the office of S. E. Jones, assignee in bankruptcy, in the city of Louisville, county of Jefferson, and State of Kentucky, to be read as evidence on behalf of the defendants in the above-styled action, now pending in the circuit court of the United States for the district of Kentucky, all parties being present by counsel.

FREDERICK K. WALKER, being duly sworn, and examined by Col. John Mason Brown, as attorney for defendant, deposed as follows:

Int. 1. State your age, residence, and occupation.

Ans. My name, Fred. K. Walker; residence, Louisville, Ky.; occupation, wholesale liquor dealer.

Int. 2. Were you a partner with W. H. Walker prior to 2nd May, 1872? When did W. H. Walker die? And did you have any

140 connection with the firm of W. H. Walker & Co. after W. H. Walker's death, and what connection?

Ans. I was a partner with W. H. Walker prior to 2nd May, 1872. We began business together in January, 1868, as partners. W. H.

Walker died on 2nd May, 1872. I was the surviving partner of the firm of W. H. Walker & Co. after W. H. Walker's death, and managed the business of that firm.

Int. 3. Under what authority or by what arrangement was the business conducted after 2nd May, 1872?

Ans. Under the authority of W. H. Walker's last will, duly probated and made of record. The arrangement was that I was to carry on the business under the firm name of W. H. Walker & Co., at the old stand, number 25 West Main street, to do a wholesale liquor business. This was the instruction of the will.

Int. 4. Did you give any notice of the change in the business? If so, when and how?

Ans. I gave notice of the death of W. H. Walker shortly after it occurred by advertisement in the Courier-Journal and editorial notice in the same newspaper, and by letters to correspondents stating that W. H. Walker had died, and that I alone would carry on the business
141 at the old stand under the name and style of W. H. Walker & Co., according to the provisions of W. H. Walker's will. I file herewith the advertisement and the editorial notice, both of which I saw cut out of the newspaper—the Courier-Journal—and I make them part of my deposition (which are as follows):

W. H. WALKER & CO.

The business of the above-named firm will be continued and carried on by the undersigned, as surviving partner, under the name and style of W. H. Walker & Co., under the provisions of the will of W. H. Walker, deceased. Ever thankful to the old patrons, their continued custom is solicited and will be highly appreciated. They may rest assured that every effort will be made to merit their confidence.

FRED. K. WALKER,
Surviving Partner of W. H. Walker & Co.

MAY 15TH, 1872.

"*An old firm continued.*—It will be seen by the advertisement that the business of the old and substantial house of Wm. H. Walker & Co. will be continued, under the provisions of Mr. Walker's will, by the
142 surviving partner Mr. Fred. K. Walker. Young Mr. Walker has had active charge of the house for some time, and is a business man of remarkable energy, tact, and skill. He will maintain the high popularity and reputation of the house founded by his father, and in his management of it give full satisfaction to its patrons."

Int. 5. Who conducted the business after 2nd May, 1872? State whether James E. Breed had anything to do with it, and whether he attempted *he attempted* to take any part in it as executor or otherwise. Did Mary D. Walker take any part, or attempt to take any part, in the management of the business as executor or otherwise?

Ans. I conducted the business after 2nd May, 1872, under the provisions of W. H. Walker's will. James E. Breed had nothing whatever to do with it either as executor or otherwise. Neither Mary D. Walker nor himself had anything to do with the business as executors, except as I was directed by the will to carry on the business, and I did so. Mary D. Walker had nothing to do with the business, neither as executor nor in her individual right, nor in any capacity. She never was in the storehouse in her life, that I recollect of.

143 Int. 6. Had the business been profitable or unprofitable up to 1872?

Ans. The business had been profitable and satisfactory up to 1872. In the year 1871 I remember the profits were $35,712.50.

Int. 7. Who estimated the profits of 31st December, 1872? How was it done? Did you or not assort over the outstanding accounts with a view to pick out those that were good and charge off the bad? And what proportion of these accounts were charged off as worthless, and what were carried as good assets?

Ans. I estimated the profits in December 31st, 1872, by trial balance. I was assisted by J. H. Ragsdale, bookkeeper. We assorted the good from the bad accounts to select out the good and charge off the bad to profit and loss. The same care was used in the years 1873, 1874, and 1875, save where we deemed all the accounts reasonably good; then, of course, we charged no accounts off to profit and loss. To find out what accounts we had in 1872 as good assets would seem to me an almost endless job. As shown by this book, the proportion of accounts that were charged off to profit and loss was $1,213.92. That amount was charged off to profit and loss as being worthless in the year 1872.

144 All the rest of the accounts on the books at that time—bills receivable and open accounts—were carried as good assets and treated as capital and left in the firm's business, and added that much to the capital that was there previously to that time, of course.

Int. 8. Were any of those accounts, charged off December 31st, 1872, afterwards collected?

Ans. The books show that out of these accounts charged off as worthless $436.13 was afterwards collected.

Int. 9. How much of the open accounts and bills receivable were charged off on the statement on 31st December, 1873? Answer the same question as to 1874 and 1875.

Ans. I would say in 1873 there was $687.11. There were also in 1873 a number of accounts collected, which were part of 1872 accounts and part of 1873 accounts, treated as bad, that were collected in 1873, amounting to $1,067.45 according to this statement. That would come back as against the debit side.

Int. 10. And restore that much?

Ans. Yes, sir. I would have to look into the details of that account of 1874 before I could tell what it is. $3,825.14 were charged off

145 to profit and loss on July 14th, 1874. I find here in December, 1874, an account of $11,344.66 that was erroneously charged to profit and loss. Afterwards there was an entry made to correct that error on page 147. That entry would really have no force either way; it was simply an error. The books do not show anything in 1875 that I can find. There is an item of $47.80, but I do not think that is worth looking for; it is a balance. There is nothing in 1875 at all.

Int. 11. What of those charged off in 1873, 1874, and 1875 were afterwards collected? How much in the aggregate? Give it as to each year.

Ans. $1,067.45 is credited to profit and loss in 1873. In 1874 there appears to be $1,163.92, and in 1875 there appears $47.80, as shown by the ledger. There is an additional credit in a later ledger of $122.28 cash collected from these accounts that had been previously charged to profit and loss. In 1876—the firm failed in February, 1877—in 1876 there is $26.45 added, and that is entered up. That is in the last ledger. That is all I see.

Int. 12. When you made your estimate at the end of each year, and

treated any part of the accounts or bills receivable as good assets,
146 did you or not retain them in the business of the firm; and how, if at all?

Ans. Well, we declared the profits at the end of each year by a trial balance, and the accounts receivable and bills receivable of course we left in the firm; they remained there and swelled the capital that much.

Int. 13. They constituted part of the capital, did they?

Ans. Exactly.

Int. 14. In your declaration of profits in each year, was there any purpose or intention to swell the profits beyond what you really thought them, or to make any untrue or deceptive dividend?

Ans. There was no purpose to swell the profits of any year that I know of. We desired to state the profits as we believed them to be in good faith; nor did we wish to make any untrue statement at any time.

Int. 15. Did James E. Breed or Mary D. Walker, either of them, have anything to do with declaring the profits?

Ans. Neither James E. Breed nor Mary D. Walker had anything to do with declaring the profits, nor did they at any time have anything to do with the details of the business of our firm.

Int. 16. Did you have the assistance of any bookkeeper or
147 salesman in making up your estimate of the profits at any time?

Ans. I had the assistance of J. H. Ragsdale, who is now dead. He was a graduated professional bookkeeper and accountant, and was thought to be a good bookkeeper by those who knew him.

Int. 17. Did anyone else assist you at any time?

Ans. Mr. Wright would sometimes look over the books and advise me from time to time, and assist me in whatever he could do.

Int. 18. Had Mr. Wright been with the firm before your father's death or not?

Ans. He was with my father previous to his death.

Int. 19. In the same capacity?

Ans. In the capacity of clerk—clerk and salesman.

Int 20. Did you declare the profits in each year on a balance sheet first made out, or merely guess at them?

Ans. We declared the profits by balance sheet and not by any guess work.

Int. 21. State whether James E. Breed or Mary D. Walker were called in or consulted about the balance sheet.

Ans. Mary D. Walker or James E. Breed were never called in
148 or consulted about balance sheets or anything else. Mary D. Walker was never in the store that I recollect of during all the time of the carrying on of the business.

Int. 22. State how the profits declared by you were divided. That is, to whom were they paid over; and give, if you can, a statement of the payments made in each year.

Ans. The profits, after being declared, were credited to the account of the estate of W. H. Walker, deceased, their share, and my share was credited to my account; such amounts of the profits as we were called on for we paid to Mary D. Walker, guardian, and to others that were entitled to it as they needed money for living expenses, but no part was ever paid over to James E. Breed.

Int. 23. You speak of Mary D. Walker being guardian; of whom was she guardian?

Ans. She was guardian of the infant children of W. H. Walker, deceased. At the time W. H. Walker died there were six infants under the law; there are now four infants under the law.

Int. 24. Was or was not Mary D. Walker the head of the family?

Ans. She was the head of the family.

Int. 25. And lived at the homestead?

149 Ans. Yes, sir; 282 Fourth street, between Chestnut and Broadway.

Int. 26. Was any part of the proceeds directly paid over to the executors of W. H. Walker?

Ans. None that I know of.

Int. 27. What sum did you agree to pay for the one-sixth interest purchased by you to make your share a full half?

Ans. $20,295.70. That was for a sixth interest to make my share, which was a third previous to that time, equal to a half.

Int. 28. Upon what terms did you make that purchase as to time? And state whether you paid the amount so agreed; and, if so, how?

Ans. I bought the interest on time—on one, two, and three years' time, and gave my notes of equal amounts, each note for $6,765.23, one, two, and three years without interest. The bookkeeper at that time charged my account with $20,295.70 and credited the account of the estate with the same amount. These notes were paid, and I have them in my possession.

Int. 29. Who was the bookkeeper that made the entry you speak of?

Ans. I. H. Ragsdale.

150 Int. 30. That entry by Ragsdale as it appears on the ledger seems to indicate that the sale to you was made and the money charged to you immediately, as though it were a cash transaction. Was that entry correct?

Ans. I think not. I think the entry ought to have been made at the time the notes matured, because the payments were not due and payable until the notes were due and payable.

Int. 31. Did you actually pay these notes—each of them?

Ans. I paid the notes with my profits.

Int. 32. Was any part of the capital of W. H. Walker & Co. used in paying these notes?

Ans. There was no part of the capital of the estate of W. H. Walker used in paying these notes.

Int. 33. Was there any part of the capital of the concern used?

Ans. If the notes were paid out of my share of the profits, of course it used the capital out of that share, but the capital did not go out of the business; it remained there really.

Int. 34. Was any part of the assets of the concern of W. H. Walker & Co. diverted from the business of the firm to pay these notes or either of them?

Ans. No, I should judge not.

151 Int. 35. What caused the bankruptcy of W. H. Walker & Co.?

Ans. The bankruptcy of W. H. Walker & Co. was immediately caused by the failure of Thomas Walston. The firm of W. H. Walker & Co. were endorsers for Thomas Walston, and when Walston's paper went to protest W. H. Walker & Co. were thrown out of bank and forced to the wall by Walston's failure.

Int. 36. Was there any other failure concerned in bringing about the failure of W. H. Walker & Co.?

Ans. I do not think that there was any other immediate cause for the failure of W. H. Walker & Co. I think the failure of Gardner & Co. previous to that time, which I think occurred in 1876, the early part of 1876, I think that had a tendency to weaken the credit of the firm of W. H. Walker & Co.

Int. 37. To what amount were W. H. Walker & Co. endorsers for Gardner & Co.?

Ans. At the time of their failure

Int. 38. Yes, sir.

Ans. Well, I should judge $50,000.

Int. 39. How much did W. H. Walker & Co. pay on account of the Gardner endorsements?

Ans. The amount paid out here on the debit side of the ledger is $61,142.01. To the credit of that account is $11,508.42.

Int. 40. Leaving paid out how much?

152 Ans. $47,763.59. There is also paid out for Gardner on interest $1,036.67. That is all, I believe.

Int. 41. Did you or not personally provide any of the money which went to meet the endorsements of the firm on Gardner's paper?

Ans. At the time Gardner & Co. failed I was possessed of considerable real estate in the city of Louisville—real estate that cost me in the neighborhood of $20,000. I sold that real estate at as much as I could get for it, the full market valuation at that time, and put the money that came from it into the firm of W. H. Walker & Co—placed that much to my credit, and used that money towards paying the Gardner debt and other debts of the firm of W. H. Walker & Co.

Int. 42. So you assisted the firm to the extent of your private fortune, did you?

Ans. I did; I have not got a piece of property in Louisville—nowhere.

Int. 43. Who were the usual endorsers of W. H. Walker & Co. prior to W. H. Walker's death?

Ans. McFerran, Armstrong & Co. were one of the endorsers of W. H. Walker & Co. previous to my father's death. My father had a num-

153 ber of endorsers, but I do not know that I can give you all the names correctly. The firm of McFerren, Armstrong & Co. indorsed the bulk of the paper that was endorsed previous to my father's death.

Int. 44. Did they continue to endorse for the firm after your father's death or not? or was any question raised on that point?

Ans. I went to them after my father died and requested that they continue to indorse for the firm of W. H. Walker & Co. They declined to do so until they could get a legal opinion from their lawyer, and they procured a legal opinion—a written opinion of their lawyer—and that opinion indicated to their minds that the property, the real estate left by my father, was not bound for the firm debts. Then they refused to indorse for the firm of W. H. Walker & Co. except upon a written agreement that was drawn up at that time, which was signed by the firm of W. H. Walker & Co. and by the firm of McFerren, Armstrong & Co., in which the firm of McFerren, Armstrong & Co. became the acceptors of this paper and W. H. Walker & Co. became drawers & endorsers. They requested and urged that the firm of W. H. Walker & Co.

154 pay off their liability where they were bound as fast as possible, which was done.

Int. 45. Did they or not then cease to endorse further?

Ans. They ceased to endorse for the firm as soon as the firm liquidated the paper that they were on.

Int. 46. It appears from the proofs of debt in the matter of the bankruptcy of W. H. Walker & Co., that a good deal of paper is outstanding upon which proof is made against W. H. Walker & Co., which arise in transactions in which Thomas Walston is concerned. Will you please state what the nature of this paper is?

Ans. It is purely accommodation paper?

Int. 47. Do you mean that the endorsements by W. H. Walker & Co. are purely accommodation?

Ans. Accommodation for Walston and Walston's accommodation for W. H. Walker & Co.

Int. 48. Were they based on real business transactions between Walston and W. H. Walker & Co.?

Ans. No; I should say not—strictly and legitimate business transactions, I should say not.

Int. 49. Did you ever consult with your co-executors as to making these endorsements, or did you make it on your own responsibility?

155 Ans. I never had any consultation with either of the executors. I did it on my own responsibility.

Int. 50. Do you recollect approximately the amount of that paper upon which W. H. Walker & Co. appears, arrising out of Walston's transactions?

Ans. I should think that where Walston endorsed for us and where we endorsed for Walston, counting both sides of the bill-book, that there was in the neighborhood of $70,000 of it. I think there was probably $32,000 on one side, and may be $41,000 on the other. Something like that, as near as I can recollect.

Int. 51. Is it or is it not a fact that the firm of W. H. Walker & Co., as constituted and existing on 2nd May, 1872, would now be solvent but for the Gardner transactions and the Walston transactions?

Ans. Certainly they would be solvent, in my judgment—perfectly so.

Int. 52. Did the firm of W. H. Walker & Co. derive any profit from its endorsements for Gardner?

Ans. No, sir; none whatever.

Int. 53. Do you know whether Mary D. Walker individually was on any of the Gardner paper?

Ans. No; on none for Gardner. She endorsed some paper for W. H. Walker & Co.

156 Int. 54. Upon which Gardner's name was?

Ans. Upon which Gardner's name appeared with hers, but it don't seem to my mind that it was for the Gardner debt. Gardner went on some paper with her to strengthen the paper, and she was on some of that kind of paper where Gardner's named appeared.

Int. 55. Do you know whether or not Mary D. Walker's private fortune has been in any way affected by any such endorsements? And, if so, how?

Ans. Mary D. Walker endorsed for the firm of W. H. Walker & Co., and lost all of her private fortune which she inherited from her father, and all her means in fact, and was forced to make an assignment to George Davis for the benefit of her creditors.

Int. 56. What is the property of W. H. Walker now in the hands of his executors—what does it consist of?

Ans. It consists principally of unimproved real estate.

Int. 57. What revenue, if any, accrue from it as near as you can estimate?

Ans. There are some three pieces that have buildings on it, and there is a dwelling house in which my mother lives, and there is the
157 storehouse number 25 West Main street, in the city of Louisville—both of these pieces and a house and lot on Second street, between Main and the river, in the city of Louisville, for which rentals are paid monthly at the rate of $140 per month for the whole. My mother derives the benefit of that $140 per month I believe almost en-

tirely. She is allowed by the executors to collect the $140 per month. I believe almost entirely she uses the money, but it is barely sufficient to pay insurance and taxes the way property is now.

Int. 58. Do or not the infant children of W. H. Walker reside with Mary D. Walker, their mother?

Ans. They do.

Int. 59. Is there any support for the family over and above the rentals of which you have spoken?

Ans. None at all—none whatever.

Int. 60. I will ask you whether or not the executors of W. H. Walker left other monies in the charge of W. H. Walker & Co.?

Ans. Yes, sir; the rentals and revenues from the estate generally went into the hands of the firm of W. H. Walker & Co., and
158 was credited to the account of the estate from time to time as it was put in.

Int. 61. Did or did not the payments of such monies go out under your personal supervision?

Ans. Yes, sir; it went out under my personal supervision, as no one else had anything else to do with the disbursing of it.

Int. 62. What was the average deposit of rentals standing to the credit of W. H. Walker's estate, standing on the books of W. H. Walker & Co.

Ans. The rental of the storehouse on Main street is put down here from May, 1872, to March, 1877, four years and nine months, at an average of eighteen hundred dollars per annum, which, carried out, makes $8,550. The rental of the office over the storehouse for four years and nine months was three hundred and sixty dollars ($360) per annum, which makes $2,710. The rental of the office in front of the storehouse for four years and nine months, $240 per annum, makes $1,140. The rental of the lot on Fourth street—estimated value of same of all rents received during that time, $100+. The rental of lot on Fourteenth and Delaware streets—estimated value of the same of all
159 rents received during said time, $1,300. The rental of stone house on Second street, from May, 1872, to March, 1877, four years and nine months @ $360 per annum, $2,710. That is all the rentals, I believe.

Int. 63. The whole of the rentals amounting to how much?

Ans. $16,510.

Int. 64. Did any sum belonging to the estate of W. H. Walker come to be deposited as insurance money realized?

Ans. My recollection is that the amount of insurance money received was $10,000. The firm of W. H. Walker & Co. also received $4,800, as near as I can recollect, as insurance on the life of W. H. Walker, deceased, which policy was made in favor of Mary D. Walker, and that $4,800 was allowed to remain in the firm from about the time of W H. Walker's death to the time that the firm failed, and the firm owed Mary D. Walker for that $4,800, for which she held the firm's note, $4,800 and some odd dollars. I don't know the exact amount; but that life insurance money was allowed to remain there, the firm giving her their note, and she held it after the firm failed.

Int. 65. What was the total amount of the principal on deposit with the firm from all sources?

160 Ans. $54,138.45.

Int. 66. Does that $54,138.45 include the $20,000 and odd dollars paid by you for the one-sixth interest?

Ans. It does.

Int. 67. Taking out what was paid by you for the one-sixth interest, what would be the deposit account of W. H. Walker's estate with the firm?

Ans. $33,842.75.

Int. 68. Did that constitute any part of the capital of W. H. Walker & Co., or was it purely a deposit, subject to the order of the executors of W. H. Walker.

Ans. It was a deposit subject to the withdrawal, I suppose, of the executors, but it really helped the firm along in its business.

Int. 69. Did any executor ever draw checks against this deposit, except yourself?

Ans. No.

Int. 70. I will ask you whether or not W. H. Walker & Co., after May, 1872, did or did not go upon paper, and assist in carrying debts of James Kennedy, William Keeley, John Cawein & Co., John M. Stokes & Son, J. M. Duncan, J. W. Rasdale & Holmes, and whether or not they ultimately had to provide for these debts?

Ans. We went on paper for all these parties mentioned, and
161 we finally had to pay considerable sums for them as security debts.

Int. 71. Do you recollect how much these items amount to?

Ans. We paid for James Kennedy $9,000; for William Keeley, $5,000; for John Cawein & Co., as near as I can recollect, about $7,000; for John M. Stokes & Son, as near as I can recollect, $3,500; for J. M. Duncan, between $800 and $900—I am not certain, but I think between $800 and $900; for J. W. Rasdale & Holmes, $700.

Int. 72. Did or not the firm have in hand, as you have before stated, ample funds belonging to the estate of W. H. Walker & Co., exclusive of its interest in the capital stock, to meet these debts?

Ans. We had.

Int. 73. When endorsements were made by the firm of W. H. Walker & Co., after May, 1872, or accommodation paper in any shape gotten up, upon which their names appeared, by whom was the name of W. H. Walker & Co. signed?

Ans. Signed by me. My signature was the only genuine signature of the firm.

Int. 74. Did you consult your co executors in such matters at all?

Ans. No, sir; I did not consult them at all. I had the manage-
162 ment of the business of the firm of W. H. Walker & Co.; the law gave me that right; I was acting under the provisions of the will.

Int. 75. Did you ever knowingly, or at all, so far as you are aware, pay out to the widow or children of W. H. Walker, or to any one claiming on his account, any part of the capital stock of the firm of W. H. Walker & Co.?

Ans. None whatever that I recollect of. We disbursed to them under the will sums of money coming to them under the will as they arrived at the age of twenty-one years.

Int. 76. Was the capital stock of W. H. Walker & Co. impaired so far as you know or intended by any payments made to any of the children or the guardian of any of the children of W. H. Walker?

Ans. No.

Int. 77. Which one of the executors had charge of the management of the financial affairs of W. H. Walker?

Ans. I had.

Int. 78. Did you keep the accounts or did the other executors?

Ans. I kept the accounts, assisted by clerks and bookkeepers.

163 And the further taking of this deposition was thereupon adjourned until Monday, May 13th, 1878.

JULY 26TH, 1878.

This day parties met by consent. Col. John Mason Brown for the def't, and Mr. Byur for compl'ts, and, by consent, the taking of the deposition is resumed as follows:

Cross-examination by M. BYUR, Esq., counsel for the assignee:

Cr. 1. Was the money which was withdrawn from the business and charged to the several parties named by Mr. Nones, paid to these parties who were so charged with it?

Ans. I do not know what you mean exactly, Mr. Byur.

Cr. 2. I mean Mrs. Mary D. Walker, Mr. Jas. E. Breed, and the other heirs or devisees under the will of William H. Walker, deceased?

Ans. The monies were paid to the parties; the monies were paid direct to the parties with the exception of Mr. Breed. That money was paid to Mr. Breed's wife. There was no money, that I recollect of, paid to Mr. Breed; it should be Mrs. James E. Breed, or Lizzie Walker Breed.

Cr. 3. And who paid it?

Ans. It was paid by me.

164 Cr. 4. By checks?

Ans. Sometimes by checks and sometimes by currency.

Cr. 5. As was most convenient to you?

Ans. Yes, sir.

Cr. 6. Were you present during the taking of the deposition of Mr. Nones in this case?

Ans. I was present, I believe, most of the time.

Cr. 7. Did you read his deposition and examine the list which he made a part of that deposition before you gave your deposition in chief in this account?

Ans. Yes, sir; I believe I did.

Cr. 8. In your answer to the 7th inter'ogatory-in-chief you stated that you estimated the profits in December 31st, 1872, by trial balance. I wish to ask you if in question & answer 7th in chief were taken in account all the choses in action, consisting of open accounts, notes, and bills receivable, that were left in the firm, except the amount of $1,213.92 charged to profit and loss.

Ans. Assuredly they were all considered good accounts, except the sum of $1,213.92—that is, to the best of my knowledge and belief, sir.

165 Cr. 9. Now, you have also stated that out of the sum of $1,213.92 charged to profit and loss some of it was afterwards collected?

Ans. Yes, sir; I think the books will show that.

Cr. 10. Please state whether of the choses in action, consisting of open accounts, notes, and bills receivable, retained as capital in 1872, on which a profit was declared, any turned out to be worthless?

Ans. I do not think there were any turned out to be worthless.

Cr. 11. All collected in full?

Ans. I do not know as to that; I could not tell as to that.

Cr. 12. Were there any due and unpaid on December 31st, 1872, which were retained as good?

Ans. I never made out any statement to show, but I presume there were. Many men dealt with us that were slow, but we believed them

to be good; we supposed the accounts to be good, and we finally collected them.

Cr. 13. But you could not now state what amount of the choses in action thus retained as capital were lost?

Ans. No, sir; I could not; I believe many of them can be col-
166 lected now.

Cr. 14. Now on 31st December, 1873, you charged to profit and loss as worthless, of the choses in action then on hand, the sum of $687.11. Did you carry all the rest of the choses in action as good assets?

Ans. Yes, sir.

Cr. 15. Were any due and unpaid at that time?

Ans. I do not remember, sir, but I suppose there were.

Cr. 16. Do you remember what proportion of the choses in action was carried forward, and turned out to be worthless?

Ans. No, sir; I do not remember.

Cr. 17. You have not made any examination of your books with the view of ascertaining that?

Ans. I made an examination of our books at the time the several trial balances were taken off. They were taken off from time to time as I explained there.

Cr. 18. I mean you have not made an examination for the purposes of this deposition?

Ans. No, sir. I have not made any particular examination of the books.

167 Cr. 19. And in 1874, you say $3,825.14 was charged to profit and loss; that was in July, 1874?

Ans. Yes, sir; it may have been done in July, 1874, but it was the custom of the firm to close up the books and take off a trial balance on 31st December, each year.

Cr. 20. Now in December, 1874, you state that $11,344.66 were charged to profit and loss as worthless, and then restored by a counter entry.

Ans. Yes, sir.

Cr. 21. Did that $11,344.66 so charged embrace the sum of $3,825.14 charged in July?

Ans. I do not remember that, but I think the $3.825.14 was separate and distinct from that.

Cr. 22. You say that the entry of $11,344.66 charged to profit and loss in December, 1874, before the profits were declared, was a mistake.

Ans. Yes, sir.

Cr. 23. Who committed that mistake?

Ans. I think the original entry was made by Mr. J. H. Ragsdale in the blotter, and by me transferred from the blotter into the journal or day-book.

Cr. 24. When did you find out the mistake?

168 Ans. The mistake was found out by going critically over the ledger and examining the accounts. I went over them with the clerks in the office and examined letters and documents we had from lawyers and travelling men and people of that kind who knew the value of accounts, and we considered the entry erroneous and made a counter entry to correct it.

Cr. 25. How much time intervened between the entry which first charged it to profit and loss and the entry which restored it to the capital?

Ans. I do not remember, but the entries are not many pages apart.

Cr. 26. Will you please refer to the book and state?

Ans. One entry is made on page 130, and the other is on page 147 of the same book.

Cr. 27. Give the dates of both?

Ans. One is on December 1st, 1874, and the other on December 1st, 1874; both dates are alike; I suppose time enough elapsed to examine the accounts, as I have before stated.

Cr. 28. The last entry, then, had the effect of destroying the first entry?

Ans. Yes, sir; I suppose so—I am not enough of a practical
169 book-keeper to go into details, but I presume that was the effect of it.

Cr. 29. Was not that the object of the last entry?

Ans. The object of the last entry was to correct that error. Yes, sir.

Cr. 30. Well, these accounts were all collected, were they, $11,344.66, a great portion of them?

Ans. I do not know, sir, whether they were or not.

Cr. 31. You stated in your deposition in chief, in answer to the 7th question, that these assets, consisting of accounts, bills, and notes, upon which a dividend was declared as if it were capital, were left in the firm as active capital, and therefore went to swell the capital of the house?

Ans. Yes, sir.

Cr. 32. And the profits which were taken out in money, not in choses in action and went to deplete the capital of the firm to that extent, did not it?

Ans. Under the will of W. H. Walker, deceased, we, as executors were required to pay these parties certain sums of money.

Cr. 33. I mean that it went to deplete the capital?

Ans. We carried out the provisions of the will; I do not know
170 that the capital was depleted any because these choses in action, accounts, notes, and bills receivable were considered good assets.

Cr. 34. But the fact remains that the bills, notes, choses in action, and open accounts were left as capital and the money was withdrawn?

Ans. The money was withdrawn, yes, sir. But on the other hand the parties to whom these profits were declared at the end of each and every year, as I have heretofore stated, allowed their profits to remain in the concern. The profits were not drawn out in bulk; they might have drawn out these profits in bulk under the provisions of the will, but they did not do that. They allowed the profits to remain.

Cr. 35. Until they drew them out?

Ans. They were not paid out as profits. They were paid out to them as their necessities required.

Cr. 36. Still they were paid out?

Ans. Yes, sir.

Cr. 37. In your answer to the 22nd interrogatory-in-chief, you state that "the profit, after being declared, were credited to the account of the estate of W. H. Walker, deceased, their share, and my share
171 was credited to my account. Such amount of these profits as we were called on for we paid to Mary D. Walker, guardian, and to others that were entitled to it, as they needed money for living expenses, but no part was ever paid over to James E. Breed." Now, were the amounts so withdrawn and paid to the estate of W. H. Walker, deceased, and to you and to Mary D. Walker, guardian, and to others, charged to their respective accounts on your books when paid out?

Ans. The money paid over to Mary D. Walker, guardian, and to Lizzie Walker Breed, and to all the other parties so far as I recollect,

these amounts were paid directly to them and receipts taken from them for the amounts paid to them, but the amounts were charged to the estate of W. H. Walker, deceased, on the books, as I recollect, with the exception of the money that was disbursed to myself.

Cr. 38. It was all charged to the estate of W. H. Walker, deceased?

Ans. Charged to the estate of W. H. Walker, deceased, and receipts taken from these several parties as coming from Frederick K.
172 Walker, executor. I had to preserve the vouchers for these monies that were paid out, and I took these vouchers in that way—"Received from Frederick K. Walker," so much money.

Cr. 39. Then the account with the estate of W. H. Walker, deceased, exhibits on the debit and credit sides all the money received from it and all the money paid to it?

Ans. It exhibits that. I do not think that it exhibits completely some monies that were derived from outside sales of property that was sold from time to time by the executors and were disbursed without any entries on the books at all. There may have been some stocks sold of which no entry was made.

Cr. 40. That did not go on the books at all?

Ans. I do not think that went on the books at all. There was not much of that.

Cr. 41. Was it received into the business at all?

Ans. I think some money at one time was disbursed in that way without going on the books. But the greater part of it was disbursed by credit and debit to the estate of W. H. Walker, deceased.

173 Cr. 42. Did the house of W. H. Walker & Co., as carried on by you, receive any money from the estate of W. H. Walker, deceased, which it did not credit on the books?

Ans. I think maybe there was a few hundred dollars sold by the executors, and probably money disbursed without making any entry, but that amounts to very little.

Cr. 43. Did any money come from the estate of W. H. Walker, deceased, into the office of W. H. Walker & Co. that was not credited on the books to the estate?

Ans. None that I recollect of. All the rents, &c.—all the proceeds was credited on the books of the firm of W. H. Walker & Co. to the estate of W. H. Walker, deceased.

Cr. 44. And all money disbursed——

Ans. Was charged to that account as far as I recollect.

Cr. 45. You purchased the one-sixth interest in the firm as you had the right under the will of your father, and you say you paid for it $20,295, and you gave your notes for it—three notes—each for $6,765.23. When these notes were given the account of William H. Walker, deceased, was credited with that amount as if it had been paid in cash?

Ans. Yes, sir.

174 Cr. 46. That was a mistake, was it not? You did not pay cash for it?

Ans. The bookkeeper at that time, if I recollect aright, was I. H. Ragsdale, and the entry was made by him in the books. My account was charged with the amount stated and credited to the account of W. H. Walker, deceased.

Cr. 47. It was not paid in cash?

Ans. No, sir; it was not intended to be paid in cash, else the notes would not have been given.

Cr. 48. You intended to pay these notes out of the profits which were to accrue to you in the meantime?

Ans. I expected to pay them in that way, else to sell some property I had outside and discharge the notes in that way.

Cr. 49. If you sold any property your account was credited with that amount on the books?

Ans. What property I had was sold and the proceeds went into the business.

Cr. 50. And that was credited to you on your account?

Ans. Yes, sir.

Cr. 51. All the money you paid in was credited to you?

Ans. Yes, sir; and was used to discharge the firm debts.

175 Cr. 52. How much were you owing to the firm at the time you bought this interest and gave your notes for $20,295? Please look at the books, and state it.

I will ask you a leading question, which will facilitate it. Please look at ledger C, folio 11, and state whether at the time you gave these notes for $20,295 your account was not credited solely with your interest in the firm amounting to $5,124.18. Had you any more credited in that firm than that amount?

Ans. I had $5,124.18 to my credit at that time.

Cr. 53. And when you were charged with the $20,295, you thereby became a debtor to the firm for the difference between these two sums, of course?

Ans. Yes, sir; but it also true that these notes had not matured; these notes were given at one, two, and three years, if I recollect aright, and I did it with the consent of the other executors, if I recollect; I had the privilege under the will to do it.

Cr. 54. Then the estate of W. H. Walker, deceased, being credited with that sum for which you gave notes which was not paid, and

176 which were not due, was a mistake, was it?

Ans. I would think so.

Cr. 55. It ought never to have been credited at all?

Ans. I think not; the notes were given in good faith, though, and I not being a first class accountant did not know that.

Cr. 56. Did you ever pay off these notes except by such credits as appeared to your credit on the books by declaration of profits or otherwise?

Ans. I paid them by declaration of profits.

Cr. 57. As they appear on the accounts?

Ans. Yes, sir.

Cr. 58. And then you took up the notes which you have in your possession?

Ans. Yes, sir.

Cr. 59. You had these notes in your possession from the time they were given?

Ans. I did not have them in my possession.

Cr. 60. Who had them?

Ans. At the time they were given they were in the possession of Mary D. Walker and James E. Breed.

Cr. 61. They surrendered them to you?

Ans. Yes, sir.

177 Cr. 62. When?

Ans. At the time the several trial balances were made up, at the end of the year, they were surrendered to me.

Cr. 63. I will ask you to look at ledger D, folio 17, and state whether you did not owe the firm $28,220.44 after getting credit for all the profits

which were placed to your credit for everything you put into the concern at any time?

Ans. Yes, sir; that is true; my schedules show that.

Int. 64. At what time did you owe this balance?

Ans. I do not know.

Int. 65. To what extent was your father endorser for Gardner at the time of his death?

Ans. I do not think my father was endorser for Gardner for anything at the time of his death; in fact, if I recollect aright, the old man, Gardner, died before my father died; the old man Gardner—Ed. Gardner—died, I think, in January, and my father died in May.

Int. 66. Of course, when I speak of your father, I mean the old firm of W. H. Walker & Co.; how much was that firm endorser for
178 Gardner at the *at the* time of your father's death?

Ans. They were endorsers for Gardner for nothing.

Cr. int. 67. That had been all discharged while Mr. W. H. Walker was living?

Ans. They had never been on his paper. We commenced endorsing for Gardner after my father's death.

Cr. 68. You speak of your paying the Gardner endorsements in your answer to the 41st interrogatory-in-chief. You state there that "at the time Gardner & Co. failed I was possessed of considerable real estate in the city of Louisville—real estate that cost me in the neighborhood of $20,000. I sold that real estate for as much as I could get for it—the full market valuation—and put the money coming from it in the firm of W. H. Walker & Co." I will get you to state what estate you bought that cost you $20,000, and how you paid for it?

Ans. I bought some property on Fourth street, between York and Breckinridge, a lot of ground, for which I paid, as I recollect now—I cannot give the exact figures, but I paid in the neighborhood of $16,000 for it.

Cr. 66. I will ask you whether that is not the estate consisting
179 of a house and lot on Fourth, between York and Breckinridge streets, purchased of Fosdick on November 3d, 1871, at the price of $15,000, and a vacant lot on the south side of Breckinridge, between First and Brook, bought of Bowen July 7th, 1877, at a cost of $3,200, making in all $18,200?

Ans. Yes, sir; that is the property.

Cr. 67. Did you pay for it all?

Ans. Yes, sir; I paid for it.

Cr. 68. And then sold it?

Ans. Yes, sir.

Cr. 69. For how much did you sell it?

Ans. I do not recollect.

Cr. 70. Did not you sell the house and lot on 26th February, 1876, to Annie Green for $7,500, and for a lot of 42 x 200 feet on Fourth street, between York and Breckinridge, subject to a lien for $3,300.00, with interest?

Ans. Yes, sir; I did.

Cr. 71. That is all you got for it?

Ans. Yes, sir.

Cr. 72. And then you sold the Breckinridge lot in November, 1876, for $2,165.63 cash, did not you?

Ans. Yes, sir; and the money that was derived from these sales were put into the business.

Cr. 73. And you were credited with it?

180 Ans. Yes, sir.

Cr. 74. And your indebtedness, as it appears on the books of the firm, is indebtedness after you received these credits?

Ans. Yes, sir.

Cr. 75. Did Mrs. Breed have an account on your books?

Ans. I think not. I do not think that her name appeared on the firm's books at all.

Cr. 76. All the money, then, distributed out of the estate of W. H. Walker, deceased, was first paid to the executor and charged to the estate of W. H. Walker, deceased, and then distributed by the executor to those entitled to it?

Ans. I think, probably, with the exception of some security debts, that were paid for W. H. Walker where he was endorser on paper.

Cr. 77. All except that was carried as I have stated?

Ans. Yes, sir; I think that is the fact.

Cr. 78. It was therefore drawn by you, and distributed by you?

Ans. Drawn by me and distributed by me, as executor under the provisions of the will. Yes, sir.

Cr. 79. Please describe more particularly the estate, real estate,
181 of William H. Walker, deceased? Give the dwelling first, if you please?

Ans. There is the dwelling-house and the seventy-feet lot on Fourth street, between Chestnut and Broadway, number 282.

Cr. 86. By what depth?

Ans. I don't know the depth of the lot.

Cr. 87. It is two hundred feet deep, is it not, to an alley?

Ans. Yes, sir.

Cr. 88. Where your mother now lives?

Ans. Yes, sir.

Cr. 89. Well, next?

Ans. There is the storehouse on Main street, between First and Second, number 25; it is a four-story brick warehouse.

Cr. 90. What is the dimensions?

Ans. I think it is 26¼ feet broad by 210 feet deep to Washington street. There is a lot of ground and a house on Second street, between Main and the river; it is a three-story house. I do not know the width of that nor the depth, nor the number. Then there is a lot of ground on First street, if I recollect aright, between Main street and the river, without any improvements on it.

Cr. 91. Do you remember the dimensions?

182 Ans. No, sir; I do not. There is a lot of ground on the corner of Fourteenth and Delaware streets, in the city of Louisville. It is quite a large lot of ground, but I have forgotten the number of feet. There are some improvements on that, but the value of them would be only nominal—put there by other parties—and it may lapse to them under the lease for all I know. There is a lot of ground that was originally—I think it was originally about four acres, situated on Fourth street between Central Park, and out of that four acres the streets were cut so that it lessens the quantity of ground, but I do not know how to describe it to you, situated on Fourth cross street beyond Central Park. There is between five and tix thousand acres of Texas land situated in Clay, Palo, Pinto, Baylor, Shackleford, Stevens, Throckmorton—I believe these are the names of the counties. I believe that is all the real estate; that is all I can recollect of.

Cr. 92. In answer to the 62 interrogatory, you state that the rental of the storehouse on Main and the other rentals went to the credit

183 of William H. Walker's estate. Do you mean that these credits were actually entered and appear on the books now?

Ans. Yes, sir.

Cr. 93. They were not omitted?

Ans. No, sir, they were entered in good faith so far as I know.

Cr. 94. They are all entered there?

Ans. Yes, sir. Of course I did not keep the books.

Cr. 95. I mean they are not outside of the books.

Ans. No, sir.

Cr. 96. The rentals, therefore, $16,510, if they amounted to that much, were credited at the proper time, in good faith, to the estate to which it belonged?

Ans. Yes, sir; so far as I know, they were.

Cr. 97. All the credits appear and all the debits appear?

Ans. Yes, sir.

Cr. 98. All the debits and credits of which you speak in your deposition appear on the books of the firm so far as you know?

Ans. Yes, sir, so far as I know.

Cr. 99. In answer to the 64 question you say that the insurance money was $10,000, of which you speak of being received was received by William H. Walker & Co.?

184 Ans. Yes, sir.

Cr. 100. And credited to what?

Ans. Credited to the estate of W. H. Walker, deceased, as I recollect. I think that insurance was on the life of a man by name of Lazmann.

Cr. 101. It was credited to the estate of W. H. Walker & Co. on the books?

Ans. Yes, sir.

Cr. 102. What about the $4,800 that was credited to Mary D. Walker?

Ans. The $4,800 was received by Mary D. Walker from a policy on the life of W. H. Walker, deceased. At the time the money was paid she allowed me to keep the money in the firm.

Cr. 103. Was it credited to her on the books?

Ans. I do not know, sir, whether it was credited. I know that a note was given to her for it, and she held the note and her assignee proved up the note against the firm for $4,800 and odd dollars. The note was dated some time in December, 1875.

Cr. 104. In your 65th answer you say—the question is, "What was the total amount of the principal on deposit with the firm from

185 all sources?" You say "$54,138.48," which included the sum of $20,000, paid for the sixth interest. All that $54,138.45 stands credited to that account on the books, does it not?

Ans. Yes, sir, as I recollect it.

Cr. 105. That is not outside of the books?

Ans. No, sir.

Redirect examination by Col. JOHN MASON BROWN, counsel for defendants:

Int. 1. When the firm of W. H. Walker & Co. became bankrupt in 1877, did it owe any debt contracted later than, say, October or November, 1876?

Ans. The firm of W. H. Walker & Co. owed no debt later than that; I should say of an earlier date than October, November, or December, 1876, and the early part of 1877, except a debt that was due Mary D.

Walker, for which she held the firm's note for $4,800 and some odd dollars. That note was dated in December, 1875, I think. I have examined the schedules of the proofs of debt, and I find that all of the paper which is proved up against the firm of W. H. Walker & Co. in bankruptcy is dated in the fall and winter of 1876, and in the
186 winter and early spring of 1877. The debts are generally October, 1876, November, 1876, December, 1876, and January, 1877, and the early part of February, 1877, except the note due to Mary D. Walker, which is dated in December, 1875.

(It is agreed that the proofs of debt in the matter of W. H. Walker & Co., bankrupts, may be read as part of this deposition from the original file in the district court.)

Int. 2. Is it or is it not true that the firm of W. H. Walker & Co., after May, 1872, was the banker for the estate of W. H. Walker and those interested in it?

Ans. The house of W. H. Walker & Co. was really the banker for the estate of W. H. Walker, deceased, and received the funds from rentals and all other sources, and credited them to the estate of W. H. Walker, deceased, and paid out monies to the parties who were entitled to receive monies under the will of W. H. Walker, deceased.

Recross-examination by M. BYUR, esq., counsel for pl'ff:

Recr. 1. In looking over the schedules of the proofs of debts
187 against W. H. Walker & Co., and in making from them the statement that there were no debts prior to the dates which you have given, have you ascertained if any or what portion of these debts consisted of bills and notes which were renewals of other bills and notes then maturing?

Ans. It was the custom of the firm at times to renew notes and bills of exchange. It was also the custom of the firm to discount paper, and where a bank refused to renew a note, we generally went to another bank, borrowed the money, and paid that bank the debt. Our credit was good at almost any bank in the city. We could do business at almost any bank in the city, and had discounted a great deal of paper with all the banks. It would be difficult for me to tell which were renewals and which were not. The firm has the ability and did pay its debts up to the time of its failure.

Recr. 2. Still that is not the question. The question is what portion of the notes or bills of which you have spoken were renewals of former bills or notes, if you can state it?

188 Ans. I could not tell you, nor do the books show.

FREDERICK K. WALKER.

United States circuit court for the district of Kentucky.

I, S. McPherson, an examiner in and for the county of Jefferson, State of Kentucky, do certify that the foregoing deposition of Frederick K. Walker was taken before me by consent of parties at the times and place named therein, the said witness being duly sworn and his testimony having been taken by me in short-hand and a full and accurate transcript being made by me, which was afterwards read over by and signed by said Frederick K. Walker in my presence, both parties being present at said examination by attorney.

Witness my hand this 26th day of July, 1878.

S. McPHERSON,
Examiner.

The parties by their counsel filed their written agreement herein, which is as follows, to wit:

Agreement.

STEPHEN E. JONES, ASSIGNEE, &C.,
vs.
FRED. K. WALKER ET AL.

189 It is stipulated and agreed, by and between the parties to this cause, that it was proved on the trial and is true that all the debts owing by the late firm of W. H. Walker & Co., and by the partners of said firm, bear date subsequent to the several declarations of the profits, or alleged profits, of said firm, and subsequent to the distribution, paying over, and reception of such profits, and none of said debts or claims against said firm were in existence at the time profits were declared or divided by said firm of W. H. Walker & Co., or any partner thereof, save only that the defendant, Mary D. Walker, had a claim antedating such declarations of profits. All this appears from record evidence in the bankruptcy court, which is voluminous and costly, which was read on the hearing hereof, and this stipulation is made to save the cost of embodying said bankruptcy record in the transcript, it having been used for no other purpose than that above stated. And this stipulation shall be copied by the clerk into the transcript of record in lieu of copying the record in bankruptcy aforesaid.

BARRET & BROWN,
Counsel for Defendants.
BYUR & DAVIE &
W. O. DODD,
Counsel for Complainants.

190 And at a term of our circuit court, held for its February term, 1879, to wit, on Tuesday, April 15th, 1879, this cause having been heard upon the pleadings and proofs and agreements of counsel, and the court now being fully advised thereof, it seems to the court the equity is for the defendants. It is therefore ordered, adjudged and decreed that the complainants' bill of complaint be and the same is hereby dismissed.

It is further ordered, adjudged and decreed that the defendants recover of the complainants their costs herein expended.

Thereupon the complainant by his counsel prays an appeal from said decree to the Supreme Court of the United States, which is granted.

DISTRICT OF KENTUCKY:

I, Samuel B. Crail, clerk of the circuit court of the United States for the district aforesaid, at Louisville, do certify that the foregoing 190 pages, this included, contains a true & complete transcript of the record of the proceedings had in the court in the case mention' in the caption hereof.

Witness my signature and the seal of said court, at Louisville, this 11th day of September, A. D. 1879.

SAML B. CRAIL,
Clerk.

(Indorsement on cover:) No. 542. Stephen E. Jones, assignee in bankruptcy of W. H. Walker & Co., appellant, vs. Fred. K. Walker, Mary D. Walker, & James E. Breed, executors of W. H. Walker, deceased, et al. Kentucky C. C. U. S. Filed 3rd October, 1879.

OFFICE SUPREME COURT U. S.
FILED
JAN 6 1891
JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

STEPHEN E. JONES, Assignee,
of W. H. WALKER & CO.,
Appellant,

VERSUS

FRED K. WALKER, et al,
Appellees.

Brief for Appellant.

The rights of the creditors, and the liabilities of the beneficiaries, of a firm carried on under the will of a deceased partner.

BIJUR & DAVIE,
GEO. WEISSINGER,
W. O. & J. L. DODD,
Counsel.

Courier-Journal Job Rooms Print.

Supreme Court of the United States.

STEPHEN E. JONES,
Assignee in Bankruptcy of W. H. Walker & Co.,

vs.

FRED. K. WALKER, &c.

Brief for Appellant.

STATEMENT OF THE CASE.

For some years prior to 1872, the firm of "W. H. Walker & Co." carried on business as wholesale liquor dealers in Louisville, Ky. The firm consisted of W. H. Walker and his son Fred. K. Walker; the interest of the former being two-thirds, and the interest of the latter being one-third.

W. H. Walker died on the second day of May, 1872, leaving a will.

By the preamble to said will, he provided that his "debts" should first be paid.

By the first, second and third clauses of said will he made specific devises to his mother, wife and nephew.

By the fourth clause he provided:

"I give, bequeath and devise all the rest, remainder and residue of my property to my children living at the time of my death; share and share alike, to be divided among them, the personalty at my death and the realty when the youngest of them living to be twenty-one years of age arrives at that age, *except* my interest in the *capital* and good will of the *business of W. H. Walker & Co.*" (Record, page 10.)

By the fifth, sixth and seventh clauses of said will he gave directions, to his executors, as to the management of his general estate, and the care of his infant children.

By the eighth clause of said will he provided:

"It is my wish that my son, Frederick, carry on the business of W. H. Walker & Co. in that name and style, and in my storehouse where it is now carried on, giving him power to change the place, until my youngest child, living to be twenty-one years of age, arrives

at that age; or for a shorter time if he does not find it profitable. To that end, all my capital and interest in said concern shall be continued therein, and shall be chargeable for its debts and liabilities; but my other property shall not be so chargeable. While Frederick carries on the said business my share shall pay the salary of an efficient man to aid him therein, or he shall have compensation for his services as to and from my share. Agents and employes of the concern are to be paid by it. Frederick is not to be charged with $5,000 advanced by me to him on his coming of age; and he is to have the privilege to purchase, at a fair valuation and upon reasonable time, such portion of my share in said concern as will make his share equal to one-half. What he may so pay, is to be divided as profits of the concern. While my storehouse is occupied by the concern it shall pay rent therefor. The profits of said concern, which shall be ascertained and declared on the 1st of January after my death, and annually thereafter, shall be divided between my wife and children or their descendants and heirs, as my personalty is to be divided among them. When my youngest child living to be twenty-one years of age, arrives at that age, or at the death of my son Frederick before that time, or when he discontinues the business, my interest in the concern and its good will shall be sold, as my executors shall direct, and the proceeds divided as the profits thereof are to be divided; with an obligation, if possible, that the business may be carried on under the old name and style."

By the ninth clause of said will be provided for the management of his daughter's estate.

By the tenth clause be provided: "When my youngest child, living to be twenty-one years of age, arrives at that age, or at the death of my wife before that time, my realty then undivided shall be divided among my children . . except my storehouse shall remain to the concern of W. H. Walker & Co., if occupied by it, till my youngest child living to be twenty-one years of age arrives at that age; and it shall then, or when it ceases to be occupied by the concern, or when the concern is discontinued, be divided as above."

By the said tenth clause be also appointed his wife, Mary D. Walker, his son, Fred. K. Walker, and his son-in-law, James C. Breed, as his executors; and, by the seventh clause, he appointed his wife as guardian of his minor children.

The testator's "capital and interest in the concern" at the time of his death, as shown by a balance struck in the firm ledger as of that date, was $89,721.59. (Record, page 28, answer to question 9.)

The bill erroneously alleges, and the answer erroneously admits, that the amount was only $82,774.59. (Record, pages 4 and 18.)

Fred. K. Walker owning, besides, one-third, ($44,860.79), made the whole firm capital $124,582.38.

As soon after the death of W. H. Walker as was feasible, a balance was struck in the ledger as of the day of his death, and the new partnership began; composed of "Fred. K. Walker, and the interest

of the estate of W. H. Walker, deceased, as limited and defined by his last will." (See Record, page 13.)

Public notice was given through the newspapers, and private circulars were sent to all customers and correspondents, that the business would thereafter be conducted by Fred. K. Walker "under the provisions of the will of W. H. Walker, deceased." (Record, page 55.)

The new firm was unsuccessful, owing in part to mistakes in selling goods to bad customers, in part to indorsing too freely, in part to the panic and the times of great commercial depression and disaster that followed, and, most of all, owing to the fact that all, or well nigh all, of the capital was drawn out of it in the manner hereinafter shown.

On the 27th day of February, 1877, after a career of four years and nine months, being hopelessly insolvent, it filed a voluntary petition and was adjudged a bankrupt. The complainant Jones was elected assignee.

The indebtedness of the firm was as follows: (Record, page 31.)

On bills payable	$175,575 20
On open account	22,748 52
Total indebtedness	$198,323 72
The firm was also bound on accommodation indorsements for Thos. Walston	33,995 97
Total liabilities	$232,319 69

Of that indebtedness, $57,423.22 was secured by pledges of whisky, etc.; and the residue ($174,896.47) was unsecured. (Record, page 31.)

The valuation of the assets of the firm was placed by them, in their schedules, at $151,282.52. They were greatly overvalued there, and proved to be worth, in the assignee's hands, only $96,357.90. (Record, page 30.) These "assets" consisted in a great part of "open accounts" ($48,187.20), of which $30,626 were classed in the schedules as "doubtful," (Record, page 45) and of which only $15,435.30 were collectible. (Record, page 30.)

In short, in a little more than four years, the whole capital of $124,582.38 was gone; debts to the amount of $232,319.69, were incurred, and there were only assets of the nominal value of $151,282.52 and real value of $96,357.90 to show for it. There had passed into the new firm, in capital and debts, $322,906. There remained but nominally $151,282.52, and really $96,357.90, and the greater part of this was pledged as collateral security for debts. (Record, pages 30 and 31.)

The secured creditors were paid in full; the unsecured creditors were paid 13 cents on the dollar, and there is a deficiency of unpaid indebtedness amounting to $135,961.79, exclusive of the Walston indorsements. (Record, page 31.)

An examination into the books of the firm, at the first meeting of the creditors, in bankruptcy, disclosed the fact that the "capital and interest" of W. H. Walker, deceased, in the firm had, from time to time, been drawn out of the firm by his executors and his wife and children, under the guise of "profits," and by overdrafts, and to pay off debts owing by W. H. Walker at the time of his death as surety; and the assignee was expressly directed by that meeting "to test in the Courts the question of the extent and nature of the liability of the estate of W. H. Walker, deceased, for the debts of W. H. Walker & Co." (Record, page 8.)

Under that direction the assignee filed his bill in equity herein, setting forth, substantially, the above facts. He further alleged that by the terms of the will of W. H. Walker, deceased, his said "capital and interest" in said firm "was to be continued therein, and to be chargeable with the debts of said firm thereafter to be incurred, and was not to be drawn out of said firm by said executors, or devisees, or by any one" so long as said firm continued to do business; and that "the *profits* only of said firm were to be drawn out from said firm, and to be received by said executors and devisees, under the terms of said will; and the said will *charged* the *capital* of said firm with the payment of its debts, and prohibited any portion of said capital from being drawn out until said firm should be discontinued and its debts all be paid."

He alleged "that the said firm of W. H. Walker & Co. *made no profits* whatever, from and after the death of W. H. Walker, and there were no profits for defendants to draw out of said firm; and the defendants should not have drawn any sum out of said firm; but notwithstanding this, and notwithstanding there were large amounts of indebtedness due by said firm . . . and for the payment of which said Walker's share of said firm capital was *charged* by said will, and by law, as aforesaid—the said executors, wrongfully, and under the false claim that the same were profits, withdrew from said firm, and from its capital, large sums of money for and in the name of W. H. Walker's estate, and used and appropriated the same to their own use and to the use of the devisees aforesaid of W. H. Walker." In other words, the bill charged that the capital fund, "all" of which, by the will of W. H. Walker was to be "continued therein and be chargeable for its debts and liabilities," had been—to the extent of about $50,000—drawn out and converted by defendants to their own use, "wrongfully, and under the false claim that the same were profits."

The bill further alleged that, by the terms of the will of said testator, Fred. K. Walker was "to have the privilege to purchase, at a fair valuation, and upon reasonable time, such portions of my share in said concern, and its good will, as will make *his* share equal one-half; what he may so *pay* is to be divided as profits of the concern;" that on January 1st, 1873, Fred. K. Walker purchased such an additional interest, at the agreed price of $20,295.70; but, that he never *paid* for it; and that "the said executors, notwithstanding said Fred. K. Walker *paid* nothing into said firm, thereupon drew out of the capital

of said firm aforesaid the sum of $20,295.70, which they paid over to and divided among the said defendants, the devisees of W. H. Walker."

The bill also charged that the defendants, the executors and devisees, without right, and contrary to the provisions of said will, drew out from W. H. Walker's assets in said concern other large sums, in different ways.

It charged that all of said sums were withdrawn "wrongfully," and "without right and without any consideration paid;" that the defendants had full notice of the terms of said will, and received the said sums with full notice that they were not profits, but that they were a part of the capital of said firm, and charged with its debts. And it alleged that by reason of said wrongful withdrawals, the said capital of said firm "charged as aforesaid with the payment of said firm's debts, was diminished, and the creditors of said firm were deprived thereof, and the said firm was reduced to bankruptcy."

The bill prayed that "the accounts of the firm of W. H. Walker & Co. be settled and said firm be wound up by the Court, and that its assets be collected, and its debts paid;" that "the said executors and devisees be compelled to pay to complainant, or into Court herein, the said sums so wrongfully withdrawn and received by them, and that the sums so realized be applied to the payment of the debts of said firm." The bill also prayed for "all general relief."

The answer admitted that large sums of money, to-wit, $50,889.53, were drawn out of said firm by the widow and children of W. H. Walker as "profits," and that Fred. K. Walker, as the other partner, drew out a corresponding sum as "profits" ($44,565.64); but it alleges that the sums ($95,455.17 in all) so withdrawn were *in fact profits*, and were properly withdrawn, as such, under the terms of the will.

It admitted that the sum of $20,295.70 was, on January 1, 1873, withdrawn by said defendants from said firm as the value of the one sixth additional interest in said firm, purchased by Fred. K. Walker; but it alleges that Fred. K. Walker *in fact paid* that sum into the firm, and that it was therefore proper, under the terms of the will, that they should so withdraw it.

It admitted that the said defendants drew out other large sums of money from said firm at various times; but it claimed that said sums were "deposits," made by defendants with said firm for safe keeping, and that they were therefore properly withdrawn.

And they denied that they are indebted to the complainant or to the creditors of the firm, in any sum whatever.

Proof was taken; and, upon a hearing before Judge Baxter, the bill was dismissed. The assignee appeals.

ASSIGNMENT OF ERRORS.

1st. The Court below erred in holding that the defendants, the devisees of W. H. Walker, deceased, are not liable to the creditors of the posthumous firm of W. H. Walker & Co. to the extent of $50,889.53, the amount acquired and received by them as profits from the operating of said firm after the death of the testator; even if there were in fact such profits.

2d. The Court below erred in holding that the defendants are not liable to account for and to pay back the said sums of money, amounting in all to $50,889.53, drawn out of the testator's portion of the capital of the said new firm of W. H. Walker & Co. as pretended "profits" during the years 1872, 1873, 1874 and 1875; because there were in fact no such "profits" made.

3d. The Court below erred in holding that the defendants are not liable to account for and to pay back the sum of $20,295.70, drawn out of the testator's portion of the capital of the said new firm of W. H. Walker & Co. on January 1, 1873, under pretense that such sum had been paid into said firm by Fred. K. Walker, for the purchase of an additional interest in said firm.

4th. The Court below erred in holding that the defendants are [illegible]e to account for and to pay back the other sums amounting to [illegible] in all, withdrawn by them from said firm, and a large portion which was withdrawn from the testator's portion of the capital of said firm, under pretense that the same were "deposits."

5th. The Court below erred in holding that the general estate of W. H. Walker is not liable to the creditors of the posthumous firm of W. H. Walker & Co. to the extent of $26,100.00; the amount of the assets of the said firm which were drawn out of it and applied to the payment of divers debts of third parties upon which W. H. Walker was bound as surety; and which debts should have been paid by W. H. Walker's general estate.

6th. The Court below erred in not referring this cause to the Master to state the accounts between complainant and defendants, with respect to the above and other liabilities of defendants to complainant; and in not giving judgment against defendants and in favor of complainant for said sums, and other sums so found to be due.

7th. The Court below erred in dismissing complainant's bill herein, and in adjudging costs against the complainant.

ARGUMENT.

I.

THE PROFITS ARE LIABLE.

Even if the so-called "profits" had been in fact earned and rightfully distributed at the time, the defendants are liable to account for them to the firm creditors, on the subsequent insolvency of the firm.

It was settled in 1804, by Lord Eldon, in ex parte Garland, 10 Vesey, 110, that in a case like this, where a partner dies, and provides by his will that the partnership shall continue for the benefit of his children or devisees, the general estate of the testator—that not embarked in the trade—shall not be held liable for the future debts contracted by the posthumous firm.

That rule was first adopted in America in Pitkin vs. Pitkin, 7 Connecticut, 314, and has since been followed by this Court in Burwell vs. Mandeville, 2 Howard, 576, and in Smith vs. Ayer, 11 Otto, 329.

The reasoning upon which the rule was established is, that the testator's *general* estate—all except that embarked in the trade—ought, upon his death, and after payment of his debts, to pass at once to his devisees; and that it would be a very great inconvenience, and lead to great confusion, if the testator's general estate was to be kept undistributed, for years, perhaps, to await the issue of the posthumous firm business. And it was considered unjust to render the devisees liable to the full extent of their patrimonies, for the debts of a business not, perhaps, consented to or approved by them, and in the policy and management of which they, perhaps, had no control or confidence. These reasons led the Court to *presume* the testator's *intention* to be that his estate shall be distributed at once, and not be held liable for the future debts of the business. And the Courts, for these reasons, held such an intention lawful and enforceable.

This rule, based upon the argument *ab inconvenienti*, although somewhat anomalous, and although it permits the testator's estate to remain a partner, with the benefits of a partner, and without the corresponding liabilities, is right, and can not be questioned.

But, further than that, the *general* estate which the testator left, and which passed at once to his devisees, shall not be disturbed or taken back from them to pay the debts subsequently incurred by the posthumous firm, the argument *ab inconvenienti* fails, and the rule has not been extended.

Thus, those very cases hold that the fund embarked in the *business* shall be liable for the debts of the trade, subsequently incurred; for, to so subject that fund will produce none of those inconveniences, inasmuch as it will in no manner disturb the vested estates of the devisees, nor open anew the closed administration of the testator's general estate.

And, for the like reason, because the argument *ab inconvenienti* does

not reach that far, the rule does not apply to prevent the Court from subjecting to the payment of the debts of the posthumous firm those earnings and *profits* which have been obtained and acquired solely by its operation.

Thus, in Hankey vs. Hammock, 3 Maddock, side page 148, *note*, where the wife, under testamentary direction, carried on the posthumous trade, and there were additional assets or profits, actually earned and taken into possession of the testator's executors, for the benefit of the wife and children, Lord Kenyon, on the insolvency of the trade, compelled the estate to pay back those accrued profits, to be applied to the payment of the trade debts. See a careful analysis and statement of that case by Lord Justice Turner, in McNeillie vs. Acton, 4 De Gex McNaughten & Gordon, side page 752.

That case, Hankey vs. Hammock, has, it is true, been doubted and denied "*so far* as it may be *thought* to decide that the *testator's* assets are *generally* liable, under all circumstances, where the trade is directed to be carried on after his death." (Judge Story, in Burwell vs. Mandeville, 2 Howard, 576.) But, as shown by Lord Justice Turner's analysis of it, *supra*, the case did not intend to decide that the *general* estate of the *testator* was liable for the future firm debts; but it only decided that the firm debts, by operation of law, were a charge upon both the capital fund left in the firm and the product or increase of that capital fund. As said by Lord Justice Turner, *supra*, there was "no account directed of the *general* personal estate of the testator, but the inquiries which were directed were, what stock and effects there were in the trade at the time of the death of the testator, and what had *accrued* from the trade from the time of the testator's death until the time when the trade was wound up." (4 De Gex, Mac. & Gord., 753.)

So understood, in its true scope, the case of Hankey vs. Hammock is of equal credit with the case of ex parte Garland; and it has never been doubted or shaken in any subsequent case. Indeed, in none of the cases of posthumous partnerships, except Hankey vs. Hammock, was the question there decided ever raised. The other cases seem to have been those of concerns to which no profits ever "accrued."

In Owens vs. Mackall, 33 Maryland, 393-394, a very carefully considered case, the case of Hankey vs. Hammock is analyzed, and is stated as deciding that the fund which had been *acquired* in the course of the trade, and which the testator's executors had received, was to be paid back, and applied to paying off the firm's debts.

Lindley on Partnership, side page 884 (a work of remarkable accuracy and critical acumen), says of the case of Hankey vs. Hammock: "It is now, however, clearly settled that the extent of the liability of the *testator's* estate does not exceed the amount authorized by him to be employed in the trade or businesss directed by him to be carried on; and it is generally admitted that the decision referred to (Hankey vs. Hammock) is *not inconsistent with the doctrine*."

In Pitkin vs. Pitkin, 7 Connecticut, 312, it was said that if there

had been profits made by the posthumous firm, "the devisees under the will are entitled to neither capital *nor profits* until the dissolution of the partnership. The company's concerns must first be attended to; and, after the extinguishment of all the debts and expenses, the devisees are to come in for their share of the net surplus, and not before." It is true that in that case the will provided that the testator's "interest in the concerns and *profits* thereof" should be continued therein, and be divided among his devisees at the end of four years. But that does not affect the principle. The devisees were in that case to get the profits at the end of four years, and in this case at the end of one year. If they are entitled to them at one time, they are at the other. The will in that case made no provision that the profits should be subject to the debts; and yet the Court said they would be so subject, by operation of law. Nor can it make any difference that the profits had not been distributed in that case. If they are liable to the debts, they can be subjected as well in the hands of a volunteer distributee as in the hands of the executor who carries on the trade. The opinion in that case, therefore, sustains the principle decided in Hankey vs. Hammock.

The rule thus settled in Hankey vs. Hammock is sound in principle and policy. No argument *ab inconvenienti* can be made against it that does not apply with equal force to any other case where creditors are to be paid. It does not disturb in any manner the settlement of the decedent's estate; but only subjects the product or increase of that which the testator expressly charged with the payment of the debts—his estate's "interest," present and future, in the concern. It secures the payment of those just debts which, contrary to the accepted idea of partnerships, are shut off from recourse on the general estate of the partner.

So just is this principle, that in enacting statutes for "limited" partnerships, under which partners might carry on trade without any of their estate being liable for the firm debts, except that embarked in the trade, it is considered right to provide that if at the termination of the partnership the assets on hand are not sufficient to pay the debts, the limited partner shall be compelled to pay back all sums he has at any time received from the firm as profits. Collyer on Partnerships, section 100; Wilkins vs. Davis, 2 Lowell, 512.

Again, suppose the *other* partner, in a case like this, remains solvent and has to pay the firm debts out of his private fortune. Would any Chancellor hold that he could not call upon the devisees to contribute, or indemnify him to the extent that they have profited by sums acquired from the operation of the firm? The remarks of Judge Lowell, in Wilkins vs. Davis, 517, *supra*, tend to show that in such a case the Chancellor would not only give such relief to the general partner, but that the assignee in bankruptcy of the concern could, by subrogation, have the same relief.

The legatees of the testator are the *beneficiaries* of the posthumous partnership. It is operated solely for their benefit. They are the

beneficial owners of it; being only *represented* by the executor appointed for their benefit by their ancestor. They have all the elements of partners—a beneficial ownership of the principal and an interest in the profits. (Lindley, side page 15.)

While, therefore, they may plausibly contend that the Court should guard them from losing anything of their vested inheritance from the subsequent vicissitudes of the trade, established, without consulting them, by the testator; they can not ask that the Chancellor, in establishing an anomalous rule to protect them, should go further than the limit of that protection. They can not complain if the Chancellor, in giving them protection from the ordinary risks of beneficial partners, shall hold that the fund embarked in the trade, and its increase, or profits, shall be subject to the risks of the trade. To so hold, is to deprive the legatees of nothing; and to leave them as the testator's will left them.

Those devisees need not receive the profits, but may leave them in the firm until it is wound up (as provided for in the Connecticut case). If they do this the creditors will be satisfied, and the devisees can not be reached (3 Kent's Comm., side page 57, *note*). But if they choose to receive the benefits of the posthumous business, whether in the form of its principal, or its products, they have adopted the firm *pro tanto*, they have *pro tanto* diminished the assets to which the creditors might look, and can not complain if, upon the firm proving insolvent, they are called on to restore that product, or principal, to meet the legitimate expenses and losses of the concern.

If it were necessary to do so, there would be strong ground, and much analogous authority for contending that in a case like this, the *devisees*, who are the beneficial owners of the capital, and who have chosen to become the sole profit-takers of the firm, are liable to the firm creditors, as *quasi* partners to the extent of *their* whole estates. The case of *ex parte* Garland and Burwell vs. Mandeville, *supra*, did not touch upon the effect of the devisees adopting the firm by taking the profits thereof; for the devisees need not adopt the firm unless they choose (3 Kent's Comm., 57, *note*) and they took no profits, and in no manner adopted the firms, in those cases. But, it has been held that a person who is to be paid an annuity out of the profits; or the *cestui-que-trust* of shares in an unincorporated company, are liable as quasi partners to the creditors of the firm; because they are interested in the *capital*, and because in taking the profits, they "take part of that fund which the creditor relies on for payment." (Lindley on Partnerships, side page 37, and *notes*.) In arguing that it is wrong to hold one who is not in *fact* a partner, liable as a partner to creditors "to the *last farthing of his property*," merely because he chooses to receive a certain part of the *profits*, and where he has no *interest* in the *capital*, Lindley says that he should, on principle, certainly not be liable "to do *more* than to *restore what he has taken*." (Lindley on Partnership, side page 34.) The creditors in this case only seek to have defendants "restore what they have taken;" and we need not and do not contend for

any harsher principle; although here defendants are "interested in the *principal*," as well as in the profits."

"There is no law in this country which sanctions a trader saying he will enter into a contract by which any *prospective benefit* arising to him shall be exempt from the payment of his debts. That would be directly against the first principles of commercial law." (Stuart's Trusts Law Rep., 4 Ch., Div. 220.)

Thus are reduced to a consistent principle the two cases, *ex parte* Garland and Hankey *vs.* Hammock, by Lords Kenyon and Eldon. That principle protects the devisees from *loss* by reason of the posthumous firm; while it makes the principal and product of the posthumous firm answer for its debts on its dissolution. The devisee is exempt from all risk of liability for the firm, except to the extent that he accepts benefits from it.

This solution of the relations of parties in this anomalous species of partnership, is not only in the line of principle, and consistent with the analogies; but it secures justice to the creditors, without injury to the devisees.

The creditor of the posthumous firm shall not complain that the devisee is not made to lose by the firm; but he can justly complain if the devisee, having received the gains of a partner, should be permitted to retain them, and risk not even *them* on the success of the firm. As the principal fund is liable to the risks of the business, so should the product be; or, in the language of the Lord-Keeper, in 2 Vernon, 535, "the sprout is to savor of the root, and to go the same way." The equity of the creditor to be paid is stronger than any right of the devisee to take profits at the risk of the creditor, and to leave the debts unpaid. It was a strange commentary on equity to see those devisees standing secure in the Court below, with $50,889.53 of the product of that firm in their hands, and to see the unpaid creditors of that firm to the amount of $135,961.79 turned out of Court by the Chancellor.

We, therefore, respectfully submit that even if those "profits" were genuine, the devisees are liable, to the extent that they have received them, to pay them back for the satisfaction of the firm debts; and that on this final settlement they are entitled to retain nothing out of that firm—principal or product—until the debts are paid.

But, as we shall now show, there were, in fact, no such "profits" to divide, nor any profits. The sums so paid out as profits were paid out of the *capital*; and, as we shall hereafter show, that capital was a trust fund for the benefit of the creditors of the concern; and said payments were illegal, and may be recovered back by the assignee, for the creditors.

II.

THERE WERE NO PROFITS.

In tracing what became of the testator's capital of $89,721.59, set apart and charged with the payment of the debts of the concern, we find that in the period between the testator's death, May 2, 1872, and the bankruptcy of the posthumous firm, February 27, 1877, there was drawn out of the firm, in cash, under the guise of "profits," the following sums:

As profits of the year 1872	$18,970 00
As profits of the year 1873	36,927 91
As profits of the year 1874	15,995 43
As profits of the year 1875	23,561 83
Total	$95,455 17

(See these amounts admitted to be correct in the answer of defendants, Record, page 19; and proven in the deposition of Nones. Record, pages 28–29.)

Of those sums, so withdrawn as "profits," the devisees of W. H. Walker received $50,880.53; and Fred. K. Walker, as the other partner, received the residue $44,574 64, being one-third for 1872 and one-half for the other years. (Record, pages 19–28–29.)

These withdrawals are sought to be justified under the provisions of the said eighth clause of Walker's will, which provides that "the *profits* of the said concern, which shall be *ascertained* and declared on the 1st of January after my death, and annually thereafter, shall be divided between my wife and children, or their descendants and heirs."

If there were, in fact, no "profits," none *could* be "ascertained" or paid out.

It must be remembered that the greater portion of the period during which said enormous "profits" were declared, was a period of panic and of unexampled commercial depression. Firms that kept alive were fortunate. And yet this firm, with its founder dead, declared and divided profits nearly equal to its capital in three years and a half, and then, in another year, turned up so insolvent as to only pay thirteen cents on the dollar to unsecured creditors. At the end of one year (1875), it declared $23,561.83 profits; and at the end of the next year, its original capital of $124,582.38 was all gone; it was in debt $198,323.72, and it had only assets worth $96,357.90, mostly encumbered.

The only special loss that occurred in 1876 to, in any manner, explain this remarkable collapse, was a loss, in the early part of that year, of $48,800.26 on indorsements for Gardner & Co. (Record 58–59). This loss, only a little more than double the amount just distributed as "profits" for 1875, is totally inadequate to account for the result. The indorsements for Thomas Walston ($33,995.97) do

not affect the question; for they did not mature until 1877, and none of them were paid, and the indebtedness of $198,323.72, counted above, is exclusive of those indorsements. (See Record, page 31.)

That a house should have really made such remarkable profits, in such unfavorable times, and then so quickly turn out insolvent, to such a degree, is to say the least, intrinsically improbable.

And so, when we come to analyze the proof, we are not surprised to find it untrue.

Fred. K. Walker testifies as to the way that he estimated the profits. He says that on December 31 of each year he "estimated the profits by trial balance." (Record, page 56, Ans. 7). He counted the accounts, bills receivable, etc., at their face value, as *cash* capital, although they might be overdue and dishonored. (Record, pages 56–64–65.) He "never made any statement to show" whether any accounts or bills receivable, which he classed as good and treated as cash capital, for the purpose of declaring profits on, were *due* and unpaid and therefore dishonored, at the time he so treated them as cash. (Record, page 63, Ans. 12.)

Under that process of estimating, he says that he counted as equal to "cash" capital, in the "statement" or "trial balance" made out for the purpose at the end of each year, all the bills receivable and open accounts owing to the firm, whether overdue and dishonored or not, except bills and accounts to the following amounts; which he says were the only ones that, in estimating "profits," he did not count as *equal to cash*.

At the end of the year 1872	$1,213 90
At the end of the year 1873	687 11
At the end of the year 1874	3,825 14
At the end of the year 1875	none
Total	$5,726 15

(Record, deposition of F. K. Walker, page 56; and page 63, answer 8; and page 64: which deposition of Fred. K. Walker was given after an examination of the deposition of Nones, previously taken.) Walker says: "*All the rest of the accounts on the books* at that time—bills receivable and open accounts—were carried as *good assets* and treated as capital." (Page 56, answer 7.) *They* were "left as capital, and the money withdrawn." (Page 65, question 34; page 57, answer 12.)

As the amount of "capital, equal to cash," thus estimated, exceeded the amount of the original capital, and the debts added, the excess was considered as the increase or profits, and that amount, in *cash*, was withdrawn and divided.

If the "assets" had been properly estimated, that would have been the correct mode; but they were not properly estimated.

In the first place, there were old debts due by W. H. Walker, and

which the new firm had assumed, amounting to $26,100.00; and until those were paid off there should have been no profits *divided*. (Record, pages 20, 21, 62.) (*Ex. parte* Harper, 1 De Gex & Jones, 191.)

In the second place, the valuations placed upon the stocks and fixtures, for the purpose of declaring profits each year, were improper. They were as follows:

	Counted at	Real value.
Louisville Industrial Exposition stock	$ 1,000 00	$ 200 00
Merchants' Insurance Company stock	2,500 00	2,150 00
Shreveport Gas stock	1,781 74	720 00
Louisville Insurance Company stock	1,460 00	1,220 00
Planters' National Bank stock	5,000 00	4,050 00
Fixtures	2,500 00	176 00
	$14,241 74	$8,516 00

(See Record, pages 32–33–45.)

In the third place, the vast amount of bad and dishonored bills receivable and open accounts, created in a reckless business, were nearly all retained and counted as equal to cash, year after year, and so made the basis of "profits."

These overdue and dishonored "bills, notes, choses in action and open accounts were left as capital, and *the money was withdrawn*." (Record, page 65, question 34; Record, page 32, answers 25 and 26.)

The extent to which this was carried can, of course, only be *exactly* ascertained on a reference of the case to the Master to fully analyze the books.

With the deposition of Nones are filed carefully prepared statements showing, fully and in detail, that on January 1, 1873, when all of the bills receivable and open accounts were counted as cash except $1,213.90, a large mass of those bills and accounts, so counted, had long before been due and dishonored—many of them as far back as 1871. (Record, pages 46 and 47; and page 32, answers 25 and 26). Of those dishonored bills and accounts $4,474.04 "remain unpaid at *this time* (1878), which were open on the books and carried as assets when the said schedules were filed, all of which were *past* due and unpaid on the 1st day of January, 1873." (Record, page 32, and answer 25; and pages 46, 47.)

This $4,474.04 of dishonored bills and accounts was again and again counted as cash capital for the purpose of declaring dividends in 1872, 1873, 1874 and 1875. (Record, page 32, answer 25.)

And so, at the end of the year 1873 other bad and dishonored bills and accounts to the extent of at least $5,965.94 were counted as cash, and "profits" were declared on that basis; in addition to which the bad and dishonored bills of 1871 and 1872 ($4,474.04, at least) were again counted. (Record, pages 47 and 48, and page 32, answer 25.)

And so, at the end of the year 1874, other bad and dishonored bills and accounts to the extent of at least $10,500.61 were counted as cash, and "profits" were declared on that basis, in addition to re-

counting the dishonored bills of 1871-2 ($4,474.04) and of 1873 ($5,915.94). (Record, pages 49–50–51; and page 32, answers 25 and 26.)

And so, at the end of the year 1875, other bad and dishonored bills and accounts to the amount of at least $21,341.61 were counted as cash, and "profits" were declared on that basis, in addition to re-counting again the dishonored bills and accounts of 1871–2, 1873 and 1874. (Record, pages 52–53–54, and page 32, answers 25 and 26.)

"The profits were declared upon the *full* value of all the choses in action mentioned in said statements." (Nones' deposition, page 32, answer 26.)

None of those dishonored bills and accounts ($42,282.20 in all) *were ever charged off to profit and loss.* (Record, pages 33–34, answer to question 36.) Some of them were due on dishonored commercial paper. (Record, pages 47–49–52.)

Tabulated, the bills and accounts due and dishonored at the ends of the respective years, never charged to profit and loss, and never paid to this day, which were counted as cash as the basis of those four declarations of "profits," appear as follows:

1872	$ 4,474 04
1873 (The $4,474.04 of 1872 + $5,965.94)	10,439 98
1874 (The $10,439.98 of 1873 + $10,500.61)	20,940 59
1875 (The $20,940.59 of 1874 + $21,341.61)	42,282 20

Or, thus:

	Bad debts counted in.	Profits declared.
1872	$ 4,474 04	$18,970 00
1873	10,439 98	36,927 91
1874	20,940 59	15,995 43
1875	42,282 20	23,561 83

It will be observed that the bad and dishonored debts considered in the above tables are only such as were so bad that, although counted as cash through successive years, they have never yet been collected, and were put on the schedules in bankruptcy in February, 1877. A reference to the Master would no doubt disclose large additional sums of dishonored debts so counted as cash.

On the face of those tables it is clear that before the profits could be "ascertained," those dishonored bills and accounts should have been charged off to profit and loss; and the "profits" declared should have been at least diminished by the amounts of those bad bills, counted again and again.

This would show that there was at least $4,474.04 too much drawn out as "profits" at the end of the year 1872; at least $10,439 94 too much at the end of the year 1873; that there should have been none drawn out at the end of the year 1874, and none at the end of the year 1875.

So apparent was it that those dishonored bills and accounts ought to have been charged off to "profit and loss" or "suspense," and not

counted as cash, that the book-keeper of W. H. Walker & Co. so charged $11,344.76 of them off to profit and loss at *the end of the year* 1874. And Fred. K. Walker was so determined to "declare profits" that he at once ordered the book-keeper to *cancel the entry* and to *charge them back again;* and he thus restored them to life, and again and again counted them as cash and drew out the real cash, as "profits," on account of them. (Record, pages 64–65, and pages 33–34–35, answers to questions 36 and 43.)

And, not a single cent was charged to profit and loss during the year 1875; *but every bill and account, including the* $42,282.20 *that had been dishonored, was treated as equal to cash, and a profit of* $23,561.83 *was declared and divided thereon.*

Fred. K. Walker did this either because he did not know what the word "profits" meant, or because he was afraid that if he did not make it appear that there were profits the business might have to be closed up, under the eighth clause of the will, which provided that the business should be discontinued "if he does not find it *profitable*," (Record, page 11), or because he saw that *the firm was breaking.*

In the fourth place, Walker considered as "good," and counted in as cash capital, for the purpose of "declaring profits," nearly all of the bills receivable and accounts receivable which had been already charged off to profit and loss by his book-keeper.

With the deposition of Nones will be found complete lists of the choses in action, which were charged to profit and loss by Walker's book-keeper in the course of each year. (Record, pages 35–40, inclusive.)

Those lists show that the following aggregates had been charged to "profit and loss" on the books, during each year:

1872, charged to profit and loss	$17,923 36
1873, charged to profit and loss	11,058 20
1874, charged to profit and loss	18,661 95
1875, charged to profit and loss	none.
1876, charged to profit and loss	none.
Total	$47,643 51

To show how bad those bills and accounts must have been, which were charged off to profit and loss, it need only be remembered that bills due and dishonored for several years were considered by Fred. K. Walker as still too good to go to his profit and loss account.

Notwithstanding those large sums were so bad that they had been *actually charged off to profit and loss*, Walker counted them all in as "equal to cash," and thereby swelled the assets for declaring "profits;" except, as we have seen above (page —), the following sums which he considered absolutely "*worthless*," and therefore did not count:

1872	$1,213 90
1873	687 11
1874	3,825 14

That left to be counted in as "equal to cash," the following sums which had, in fact, been already charged off to profit and loss on the books:

1872	$16,709 46
1873	10,371 09
1874	14,836 81
Total	$41,917 36

To thus count in as "equal to cash," such open accounts which had been charged off to profit and loss is wholly indefensible.

No justification can be found in the science of book-keeping, or in the science of law, for such a mode of creating "profits."

Nones, an expert book-keeper, testifies that the accounts that are on hand, not yet *due*, and which are considered good, are generally considered as assets in estimating profits. But he says that if "accounts are past due and unpaid," they should not be counted in ascertaining profits; but should first be charged to suspense account, and afterward, if still unpaid, to profit and loss. (Record, pages 34–35.)

It will be borne in mind that the will provided that the profits should be "ascertained" to exist before they were "declared." This of course means that the trustee or executor was to "ascertain" *correctly*. He was not to declare "profits" until they were "ascertained" to, in *fact*, exist. If a trustee in such a case makes an error, and, through it, pays out the capital, he would not be *personally* liable for the mistake, perhaps; but it would, none the less, be a dividing out of a part of the *capital* as "profits." It would be a case similar to that of an executor, whose duty it is to *ascertain* all the creditors of a decedent, and who by mistake pays over the assets to the distributees before *ascertaining* them all.

The principle for "ascertaining" profits should be, in a case like this, to subtract the sum of the liabilities (including, as a liability, the capital invested) from the business resources (excluding from the business resources the stale and doubtful bills receivable or accounts which have been dishonored, and which have been, or should have been, charged off into the "suspense" account, or to "profit and loss"). The difference will be the gain or "profits."

In Rishton vs. Grissell, Law Reports, 5 Equity, 330, Grissell, owner of an iron-works, employed Rishton as his foreman, agreed to pay him for his services "7½ per cent. of the profits in each year." The owner in making out his balance sheets, so made them out, through an erroneous idea of how to make out an account of profits, as to show there were no profits. The Court ransacked the calculation, declared the plaintiff's mode of making out his "estimate" to be wrong, and ordered a new estimate to be made on correct principles; saying that

it was the duty of the *Court* to "see that a bona fide estimate has been made and not an estimate made merely at the *arbitrary will of the employer.*"

In Lord Rokeby vs. Elliott, Law Reports, 9 Chancery Division 692, a coal mine was leased, and the lessee *in effect* agreed to pay the lessor annually a certain portion of the *net profits*. The Court said that "the profits according to the true construction of the deed are the gross returns, less the *working expenses*; and that in such working expenses are to be included just allowances, in respect of interest on capital expended, *in respect of bad debts*, and in respect of wear and tear of machinery."

Lex. Ins. Co. vs. Page, 17 B. Mon. 440, the Court says that the directors in making dividends "considered as profits the premiums on unexpired risks, and, unless this was proper, the dividends which were made were not authorized by the charter, inasmuch as, independent of these premiums, the means of the corporation, over and above its liabilities, were insufficient for their payment. . . . The *losses* must in every case be deducted before the profits, in any kind of business whatever, can be ascertained. This proposition is so self-evident that argument to sustain or illustrate it is wholly unnecessary. . . . The most safe, and, indeed, only allowable principle to act upon in such cases, would be to exclude from the computation of profits, altogether, such unearned premiums. Excluding such premiums, some of the dividends were made when there were no profits on hand to divide among the stockholders, and such dividends were obviously unauthorized and illegal,"

Other authorities illustrative of what are "profits" in cases like this, will be hereinafter cited.

III.

THERE WAS AN EXPRESS TRUST FOR CREDITORS.

The will of W. H. Walker not only provided that "all" his "capital" then in said concern should "*continue* in the concern;" but it went much further. It *expressly* provided that "all" of said "capital and interest in the concern" should be "*chargeable* for its debts and liabilities." And, in the fourth clause, in providing that his personal estate should be divided among his family at his *death*, he says: "*Except* my interest in the capital and good will of the business of W. H. Walker & Co.;" which "capital," he says in the eighth clause, shall *not be divided* among his family, until the business of the firm is finally settled up and discontinued; that is, until all the firm debts are paid off.

Here, then, is a clear, *positive* provision that all the capital shall be *chargeable* with the future-to-be-incurred debts of the concern; and

also, to make his meaning doubly sure, a *negative* provision that the said capital shall not be withdrawn for division among the family, until the firm business is discontinued and its debts all paid.

Such provisions unquestionably created an *express* trust for the payment of those who, relying on the terms of the recorded will, should thereafter become creditors of the concern. (Perry on Trusts, secs. 82–112–113.)

And they created an express *lien* in behalf of those future creditors, upon said capital fund; as unquestionably as would a clause in a will charging the testator's debts upon a certain fund, or charging an annuity upon his estate; or as would a mortgage, charging a debt, present or future-to-be-incurred, upon a specific fund or estate.

IV.

THERE WAS AN IMPLIED TRUST FOR CREDITORS.

But even if there were not such an *express* trust for the future creditors of the concern, there would, by operation of law, be an *implied* trust raised, of the same character, and equally effectual.

The general rule is, of course, that in an *ordinary* partnership every member is liable for all the debts of the firm; and the firm creditors can not only levy on the firm assets, but can obtain a personal judgment against each partner and levy it upon any and all other property of his, wherever found.

But that general rule, applicable to ordinary partnerships, is not applicable to partnerships of the peculiar and anomalous character exhibited in this case.

When W. H. Walker died, the old firm of W. H. Walker & Co. was necessarily *dissolved*. (Parsons on Partnership, side page 438.)

There was therefore, as of that day, a closing up balance struck in the books, and the *new* firm of W. H. Walker & Co. then began. (See the conclusive reasons why, in such cases, it is in law a *new* firm, in Parsons on Partnership, side page 439–440, and cases cited; and see also 6 Beavan, 501; 1 McClelland & Yonge, 574, and 11 Howard's Practice Reports, 388.) It was a new concern, with new features and relations and liabilities.

That new partnership involved on the part of Walker's, deceased, neither the personal liability, nor the liability of his general fortune, as in cases of ordinary partnerships; but only a liability to the extent of, and *in rem* upon, the $89,721.59, and its increase, which, by the terms of his will, was dedicated to and embarked in the new firm. That alone, of the testator's estate, by the terms of his will, was to be "chargeable with the debts." The testator's "other property" was "not to be so chargeable."

The testator's executor is not liable as a partner in such cases—he

being known to be only a trustee in the matter. This is shown by a very learned and logical opinion in Owen vs. Mackall, 33 Maryland 394, where all the *dicta* to the effect that an executor in such cases is liable as a partner are examined and shown to be unauthoritative and unsound.

The testator's relation, through his personal representatives, to the new firm, was therefore very close to that of a "limited" partner under statutes for limited partnerships, or like that of a shareholder in a corporation. As in a corporation, so here, there is no personal liability as a partner, and only the amount invested can be subjected to the debts incurred by the concern. The statute, in cases of "limited" partnerships, the charter in cases of corporations, and the recorded will in cases like this, have the like effect of limiting the liability to the sum invested.

Ex parte Garland, 10 Vesey, 110.

Burwell vs. Mandeville, 2 Howard, 576.

Smith vs. Ayer, 11 Otto, 329.

Those cases settle the law to be, that such posthumous partnerships are not subject to, or controlled by, the rules governing ordinary partnerships, in the respects now under consideration.

To the closer analogies of cases of "limited" partnerships, or of shareholders in companies, rather than to the remoter analogy of ordinary partnerships, then, we must look for principles to guide us in this case.

Examined in the light of those analogies, and the principles involved, we shall find that the assets embarked in, acquired by, and dedicated to, the trade, in a case like this, are to be treated as a trust fund, upon which creditors have a lien for the payment of their debts.

With respect to "limited" partnerships, which exist in this country by statutes, we have already seen that it is considered but just and politic that the fund embarked in the trade, and its product, (being the only fund liable) shall be treated as a trust fund for the creditors of the concern, and in no wise to be diverted from that purpose. Collyer on Partnership, section 100; Wilkins vs. Davis, 2 Lowell, 512.

As to corporations: in Wood vs. Dummer, 3 Mason, 311, where the now universally approved doctrine was first established by Judge Story—that the assets of a stock company or corporation are a "trust fund" for the payment of the debts of the company, and that the creditors have a right, as *cestuis que trustent*, to compel the application of said assets to the payment of their debts—Judge Story based his decision chiefly on the reasoning that the other estate of the stockholders is not liable for the debts, and, as the creditors are compelled to look to and credit only the fund invested, that fund should be considered as dedicated to them, and as a trust fund upon which they should have a lien for the payment of their debts incurred in reliance upon it. He said: "The stockholders have no right to anything but

a residuum of the capital stock after payment of all debts of the bank. The funds in their hands therefore have an equity attached to them in favor of the creditors, which it is against conscience to resist." In ordinary partnerships, where creditors can look to the personal credit and responsibility of the partner, the right is *in personam*. In cases like this, where they can only look to the concern—the *thing*, their right, is a lien, *in rem*.

The precise reasoning of Judge Story is applicable here, to W. H. Walker's capital in the new firm. No distinction can be taken in principle between that case and this. And, for the same reasons, as well as because of the *express* terms of Walker's will, the assets in this case, as in that, must be treated as a "trust fund for creditors."

In Lindley, on partnership, side pages 882–883, it is said:

"If the deceased partner has himself directed, his assets, or any part thereof, so to be employed [in a posthumous trade] so much of them as are directed to be employed are liable to make good the debts contracted during their employment; to this extent, therefore, his estate will in equity be applicable to the liquidation of the demands of those who have become creditors of the partnership after his decease. In such a case, the creditors . . . have something very like a *lien* on the assets of the deceased employed therein."

In ex parte Richardson, 3 Maddock, side page 156, a testator directed, by his will, that a trade in which he was engaged should be carried on after his death by his executor for the benefit of his family. The Vice Chancellor, Sir John Leach, held that the assets invested in said trade should be treated as "trust" property for the payment of the debts of the trade; saying: "A trustee under a will carrying on a trade, *pledges* the *trust* property given to him for that purpose."

In ex parte Garland, 10 Vesey, 120–122, a testator directed his executor to carry on his existing trade. Lord Eldon held: "As to creditors *subsequent* to the death of the testator, . . . it is admitted they have the whole fund that is embarked in the trade. . . . They have something very like a lien upon the estate embarked in the trade. . . . The property embarked in the trade *shall* be answerable to the creditors of the trade."

In Davis vs. Christian, 15 Grattan, 34, a testator provided by his will (4th clause) that the partnership business in which he was engaged should be continued after his death by the surviving partner, who was appointed executor for the purpose, and that "all my property vested in the business (and certain specified real estate) shall remain under the control of said executor for that purpose." The Court held: "The effect of the will was not to give the executors a mere right to sell the real estate or not at their pleasure during the continuance of the partnership, but to *create a trust*; to subject the real estate to the risks of the business, and give the creditors a *right* to look to it, if necessary, for the payment of their claims. . . . The first clause of his will creates a *charge* for payment of debts due by the concern at the death of the testator; the fourth for payment of debts which might arise in

continuing the business after his death. The same reason exists for the *charge* in the one case as in the other."

In Owen vs. Delamere, Law Reports, 15 Equity, 139, a testator directed his executors to employ the assets then in his business, to carrying it on after his death for the benefit of his family. The Court (Sir James Bacon, V. C.) said that the said fund in the business was a "trust fund," and that the creditors of the new firm "have a right to say that the portion of the trust estate which is committed to him (the executor) for the purpose of carrying on the business, shall not be the subject of *general* administration." And he speaks of the "equity" of the creditors of the new business to "so much as he has authorized to be employed in the business." The learned Judge further says: "The Court will give effect to the *trust* which has been *created by the testator*, and will *keep separate*, and applicable *only* to the purposes of the *trust*, that estate which the testator designed and directed to be employed for that purpose. As Lord Eldon points out in the case of ex parte Garland, the creditor has . . . a *right* to come against the *trust estate*."

In Thompson vs. Dunn, Law Reports, 5 Chancery Appeals, 573, Lord Hatherley assumed, without question, that the creditors of a trade which is carried on by executors has a "*lien*" on the assets left in it by the testator.

In Stanwood vs. Owen, 14 Gray, 199, it was said that where an *agreement* is made to continue the partnership after the death of one of them, the effect is to give "a *lien* upon the partnership assets."

In Laughlin vs. Lorenz's adm'r, 48 Pa. St., 283, it is said that "the assets of the deceased partner (where the business is continued after his death) are liable to the debts created in the business, either generally or specifically, according to the nature and extent of the *fund devoted* to the continuance of the partnership."

In Burwell vs. Mandeville, 2 Howard, 580–581, this Court, in a case of a posthumous partnership, held that the creditors of the posthumous firm "had no lien" on the *general* estate of the testator, and that the *general* estate of the testator is not to be treated as "bound" or put in "*pledge for future debts*;" but that the only assets so "bound" were "the *funds embarked in the trade*." The inference is irresistible that the Court there considered that the testator had set apart the "fund embarked in the trade" as a "pledge" or trust for the benefit of the "future debts" of the trade, and that the creditors of the posthumous firm, who took notice from the will of "what fund it binds," had a "lien" on the "fund embarked."

And so this Court, in Smith vs. Ayer, 11 Otto, 330, quotes approvingly that portion of Judge Story's opinion above which says that the will "binds" the "fund embarked in the trade."

Looking into other analogies, we find much confirmation of these views. Thus, in Emanuel vs. Norcum, 7 Howard (Mississippi), 155, where an administrator carried on the decedent's farm to complete the crop growing on it at the time of his death, the Court held that those persons who became his creditors while so engaged were to be consid-

ered as having a "privilege" or *lien* on the crop, because they had no recourse on the testator's general estate.

And so, where the testator charges a certain property or fund with an annuity (1 Leading Cases in Equity, side page 313) or with the support of named persons (Matthew vs. Bowler, 6 Hare, 110; 56 Alabama, 426), or with the payment of debts or legacies, there is a lien implied in behalf of the beneficiary.

All of those cases proceed upon the idea of an *express* trust for the benefit of creditors, where the statute or charter or will is *express* (as in this case), or upon the idea of an *implied* trust, raised by operation of law, in favor of those who, being debarred from recourse upon the general estate of the stockholder, limited partner, or testator, are considered as being in equity and conscience entitled to a lien upon that fund which they trusted, and to which alone they can look.

This case is, therefore, different from that of ordinary partnerships. There the firm creditors have no lien in their own right, but only by subrogation to the rights of the partners. That is sufficient for justice in cases of ordinary partnerships, where the creditors have recourse on the general estate of the partners, and a right to personal judgments against them.

But in cases like this, where the partner is beyond personal judgment, and where there is no recourse upon his general estate, however ample it may be, the analogy can not be that of an ordinary partnership, but is that of corporate capital; and the fund dedicated to the purpose must, to secure justice, be, as in cases of corporate funds, treated as a trust fund for creditors, whether or not so *expressly* provided for in the testator's will. And so the Courts, under varying phraseologies, have treated it in the cases cited above, and to be cited hereafter.

V.

THE TRUST FUND WITHDRAWN, CAN BE RECOVERED.

In the case of an *ordinary* partnership, the creditors having no lien in their own right, the partners may agree to divide out portions of their assets as profits when no profits exist; just as they may give away or otherwise dissipate them. The creditors can only prevent this, in such a case, when the firm has become insolvent, or when insolvency is imminent, or when it is done under circumstances showing an intent to defraud the creditors. (Collyer on Partnership, section 575. Anderson vs. Maltby, 4 Brown's Chancery Cases, 429. 29 Md., 318. 1 Foster, 467.) (If this case were to be governed by the principles applicable to *ordinary* partnerships, we would, under those authorities, certainly be entitled to recover those sums paid out as profits at the end of the years 1874 and 1875, and probably those paid out in 1872 and 1873 also. Both insolvency and fraud are shown.)

The rule is very different, however, when, as in this case, the creditors have a *lien*, not by subrogation to the rights of the partners, but *direct* and in their *own right*, upon the assets of the trade.

In such cases the creditor whether he be a creditor of a corporation (as in the case in 3d Story *supra*); or of an administrator who conducts a farm, (as in the case in 7 Howard (Miss.) *supra*); or of a limited partner, (as in the case in 2 Lowell *supra*); or of a posthumous partnership, as in this case, has the right to have that trust fund protected and preserved at all times. And, where it is wrongfully diverted, he can recover it in person, or through an assignee, and have it applied to his debt.

This right of following the trust fund, or fund upon which there is a lien or charge, and compelling its restoration or repayment, rests on very broad principles; and exists wherever the fund, or any part of it, has been received by any one other than one who receives it for valuable consideration, without notice of the trust, and in due course of the business of the concern.

It is upon this principle that distributees who have received assets of a decedent, though bona fide and by mistake, before the debts have all been paid off, can be compelled by creditors to restore the sums so received, as a trust fund for the payment of debts. (Story's Eq. Juris. section 1251).

Nor is it necessary in suing to recover back a fund on which there is a trust, or lien, or charge, to allege or prove *fraud* in the diverting of it. No such allegation is required in any case where a beneficiary sues to recover trust property from the hands of a distributee or other mere volunteer. When a volunteer or other person, without right and without valuable consideration, receives property to which he is not entitled, his *motive* in receiving it is immaterial. Whether he receive it through mistake, or intentionally; or without intending a wrong, or fraudulently; can not affect the right of the person entitled to recover it.

In Bartlett vs. Drew, 57 New York, 589, 690, where a shareholder had received a portion of the *capital* of the company, while the debts were unpaid, the Court ordered its restoration, for the creditors, saying: "It is immaterial whether he got it by fair agreement with his associates, or by any wrongful act. . . . It does not matter *how* it came into the possession of the defendant Drew. It is *enough* that he *had it*, and that it was so much of the assets of the corporation as ought to be devoted to the payment of the debts of the company."

Courts of Equity have as complete jurisdiction to recall moneys paid by mistake as moneys paid by fraud. And the pleadings in this case show, by a statement of the *facts*, both *fraud* and *mistake*. To show either, or to show the creditors' prior lien, is sufficient.

Nor does it affect the question that the debts now existing against the fund "bear *date*" "subsequent to the distribution, paying over and reception of the profits;" or that "none of *said* debts or claims were in existence at the time profits were declared or divided." (Record 72).

The last profits were declared in January, 1876. Walker says that the debts *now existing* bear *date* between October, 1876, and November, 1877. (Record, page 71.) But he further says: "It was the custom of the firm, at times, to renew notes and bills of exchange. It was *also* the *custom* of the firm to discount paper; and where a bank refused to renew a note, we generally went to *another* bank, borrowed the money, and *paid that bank* the debt." (Record, page 71.)

These modes of creating *new* debts in order to pay old ones explain why it is that the $198,323.72 of debts existing at the time of the bankruptcy bore "date" from October, 1876, to February, 1877. That enormous debt was not then incurred for the first time. The debts now in existence were not in existence when the dividends were declared; but they were incurred to raise money to pay off debts that were.

But the *date* of the debt is immaterial for a much broader reason.

The will of the testator provided that "all" his capital and interest should remain in the firm and not be drawn out by his devisees while the firm continued in business; and, it provided that only the "profits" should be withdrawn.

This not only, as we have seen, created a trust for all creditors who should thereafter extend credit to the firm, but it gave to all of them an assurance that the *capital* should *remain there until the firm ended.*

To those creditors who did not know that any "profits" were declared, the *will* gave assurance that the *capital* should *remain.* To those creditors who knew that profits were declared, that very fact was an *assurance* that the *capital* remained untouched. As said by the House of Lords in Burnes vs. Pennell, 2 House of Lords, cases 524, "dividends are *supposed* to be paid out of profits *only*, and when directors order a dividend to any given amount, without expressly saying so, they impliedly declare to the world that the company has profits which justify such a dividend."

The will created the trust or charge in behalf of all creditors alike, the later as well as the earlier.

There were *no creditors* when the trust was created. It therefore was a trust for *future* creditors. All alike, the earlier and the later, who should give credit to the firm in reliance on that capital, had the right to assume that the capital still remained there, and that none of it had been distributed in those declarations of "profits."

Suppose that in 1872, before the firm had made any debts, all of the capital had been secretly withdrawn, would it be contended that the "subsequent" creditors could not reclaim it?

It must be apparent that in cases of this character the trust is for "future creditors," and that the *date* of the debt is immaterial. The trust is for all debts incurred in the career of the firm, about to be commenced.

Thus, in the numerous cases in which corporate funds wrongly paid out as "profits," have been reclaimed for the creditors, the

Courts never stopped to inquire whether the debts were incurred *subsequent* to the wrongful declarations of profits, but say: "Nor does it make any difference that the complainant's demand originated *after* the dividends were made. The capital, as we have said, was set apart by the charter [will] as a fund for the completion of the work; all creditors *subsequent*, as well as prior, have a right to look to it, and to its faithful administration, for the payment of their debts. These debts, whether prior or subsequent, as has been said before, it may be presumed were contracted, directly or indirectly in the accomplishment of the grand object, and they have an interest in and claim upon the fund set apart by law [the will] for their payment." (Gratz vs. Redd, 4 Ben Monroe. 196.) In ex parte Garland, *supra*, Lord Eldon said that the "subsequent" creditors have "something like a lien."

Nor can the defendants pretend that they are in any other attitude than that of mere volunteers, who have received the said assets without valuable consideration, and with full notice of the trust created by the terms of the will and by operation of law. The executor who conducted the business was acting for them, and they are affected with knowledge of the facts. And they paid no consideration whatever. Of them it may be said, as of shareholders in a corporation, "there can be no pretense that both in law and in fact they are not affected with the most ample notice." Wood vs. Dummer, 3 Mason, 311.

These principles are all well settled, and are applicable alike, whether the trust be express or implied; and whether the lien or charge exist by contract or by operation of law.

In the case of Hankey vs. Hammock, 3 Maddock, side page 148, note, as we have seen, *ante*, the personal representatives of a testator, into whose hands had come the capital and product of a posthumous firm, before its debts were paid, were compelled to restore said assets, and they were held by the Court to be subject to the payment of the firm creditors.

In Sanger vs. Upton, 1 Otto, 60, it is said, "the capital stock of a corporation is a fund *set apart* for the payment of its debts. It is a *substitute* for the *personal liability* which subsists in *private copartnerships*. . . . The creditors have a *lien* upon it in equity. If diverted, they may follow it as far as it can be traced, and subject it to the payment of their claims, except as against holders who have taken it *bona fide* for valuable consideration, and without notice. It is publicly pledged to those who deal with the corporation, for their security."

In Rance's case, Law Reports, 6 Chancery Appeals, 106, an insurance company started in November, 1866, and wound up insolvent in May, 1869. In October, 1867, at a stockholders' meeting, the directors laid before the company a "preliminary *balance sheet*

from the commencement of the company to June 30th, 1867." Upon that "balance sheet" a dividend or *bonus* of ten shillings to each share was declared, and divided out among the shareholders. The liquidator, or assignee, sued one of the shareholders, as a test case, to recover back, for creditors, the amount so received by him; alleging "that the bonus was paid out of the capital, and not out of the profits of the company."

The managing director, or president, of the company testified that "although at the time of making up the preliminary balance sheet to the 30th of June, 1867, no profit and loss account was actually made out, yet the figures were carefully gone into and considered, and the assets and the liabilities of the company carefully estimated; and with regard to the latter, I say, that I and the underwriter of said company made what *we considered* to be a *fair* provision for *all losses likely* to arise, as well on marine, as mariner's life and marine, casualty policies; and that there was then, after making such provision, quite sufficient assets to declare a bonus of ten shillings per share." "He then set out what *he considered* would have been a fair profit and loss account up to the 30th of June, 1867; showing a balance profit of £1,072 12s 2d; and he explained that in making out such account it was according to the custom of other companies," etc. (page 108).

The Court held that although the president and directors claimed to act in good faith, yet there were in fact no profits to divide. To arrive at this result, the Court analyzed the "balance sheet" on which the "profits" were declared, and showed how doubtful things had been admitted to swell the capital, etc., etc.; and said: "A mere cash account or *balance sheet* in such a company as this, presented in order to determine whether there had been a profit made, and for the purpose of declaring a bonus thereon, is to my mind, within the meaning of *Stringer's case*, a fraudulent and delusive balance sheet. It purported to show something, as was said in that case, which any man who applied his mind to the subject would say afforded no clue whatever to the profit which had been made. An attempt is made to justify in this way: [the Court here quoted the evidence of the president, *supra*, to the effect that "the figures were *carefully* gone into and considered; and that the assets and liabilities were "*carefully estimated*;" and that a "fair provision" was allowed for all losses on doubtful assets; and that he did "according to the custom of other companies;" and that there were "quite sufficient assets to declare a bonus of ten shillings."] These statements the Court held to be "perfectly idle."

The Court further said: "Such a declaration of bonus, without *any profit or loss account* having been made out, is a *malafide* proceeding on the part of the directors, within the 165th section. . . . How can you divide a profit on one part of a transaction, which turned out fortunately, and then say, as to the losses on the other part, which turned out greater than were anticipated, you will not make any estimate at all? It appears to me that they had really substantially de-

rived no profits at all up to that time. I do not think that Mr. Walford's (the managing director) affidavit is satisfactory, in which he makes an estimate *ex post facto* of the probable losses, especially when he estimates those probable losses at very much less than what they ultimately turned out to be." And the Court held that the dividing out the assets as profits, when a proper profit and loss account would have shown that there were no profits to divide, was a "gross *neglect* of duty," and a "most startling and improper proceeding"; and it gave judgment in favor of the liquidator for the amount received by the shareholder.

Now, in the case at bar, as in that case, the manager made out a "trial balance," and on that trial balance he says that he went "critically over the ledger and examined the accounts," and that he used "care" and was in "good faith," and that he "considered" there were "profits." But in this case, as in that, there were in fact no profits to divide.

Indeed, this case is much worse than that; for Walker, besides over-valuing his stocks, etc., and failing to pay off the $26,100 of surety debt, not only did not take proper steps to "ascertain" whether there were any profits, but he willfully counted in as equal to "cash" dishonored debts to the amount of at least $42,282.20; and he restored to vitality bad debts to the amount of $11,344.76 which his book-keeper had, in 1874, charged off to profit and loss; and he made out *no profit and loss account whatever* for the year 1875; and he counted in as equal to cash, bad debts to the extent of $41,917.36 which had *already* been charged off to profit and loss. (See *ante*, pages 14, 15, 16.)

In the leading Kentucky case of Gratz vs. Redd, 4 Ben Monroe, 189, the charter of a company provided (substantially as Walker's will provided) that the directors should annually declare such dividends as they may deem proper out of the "net profits" of the business. The directors, in making out a balance-sheet to determine whether there were "profits," swelled the apparent assets by putting down among them the par value of certain forfeited stock, shown to be of but little or no value; and they charged the interest they had had to pay against the capital instead of against the income account; and they omitted to deduct other sums and to count other sums that ought properly to have been deducted or counted. All of those mistakes were made in good faith, from a mistaken notion as to how to ascertain profits. By those mistakes and errors it was made to appear that there were profits, when, in fact, there were none; and, as a consequence, several successive dividends were declared and paid over to the shareholders, when "there was then no surplus profits to divide at either of the times that dividends were declared; as is apparent from the books of the company and the exhibits in the case, as well as from the parol evidence adduced." They were paid out "upon an erroneous *basis* and *mistaken estimate* of profits" and the sums so paid out and credited must have been, and were, paid

out of, and withdrawn from, the capital." The Court said: "Extending to their acts the most charitable construction, it must be presumed that it was paid in mistake of fact, or law, or both. Indeed, it is evident that it was paid and credited by charging to capital that which should have been charged to expense, and subtracted from profits." The Court then said that the *creditors* had "the first and only claim until their entire demands were satisfied;" that all creditors, *subsequent as well as prior*, have a right to look to it, and to its faithful administration, for the payment of their debts;" and that "these debts, *whether prior or subsequent* as has been before said, it may be presumed were contracted, directly or indirectly, in the accomplishment of the grand object, and they have an interest in and claim upon the fund set apart by law for their payment, and may hold the directors responsible for its unfaithful distribution, or may follow it into the hands of the *distributees*, who hold it as *volunteer recipients*, having no rightful claim upon it."

And, quoting also the analogy of the right of creditors to follow assets of a decedent into the hands of his distributees, when paid over before the debts are paid, the Court state the general principle thus: "Where money has been paid under a clear and palpable mistake of either law or fact, or both, essentially bearing upon and affecting or superinducing the payment without cause or consideration, and which in law, honor and conscience was not due and payable, and which in honor, morality and good conscience ought not to be retained, it may be recovered back. This being the well-settled doctrine in *individual transactions*, we know of no reason or principle why it should not be made to apply to corporations." And the Court there, in an action on return of *nulla bona* against the company, compelled an individual shareholder to pay back the dividends which had been so divided to him under a "mistaken notion of profits."

In R. R. Co. vs. Bridges, 7 Ben Monroe, 557, the charter provided (like Walker's will) for a division of the profits. The directors "supposed *profits* to exist where in reality there were none," and so divided out a part of the capital to the shareholders.

Suit was brought by a creditor of the company against a shareholder, to recover the amount of the capital so received by him under the guise of profits. The shareholder answered, first: "That there were in fact profits to divide; and second, that though there were no profits to divide, the directors acted in good faith under a mistaken notion of what constituted profits, and without any wrongful or fraudulent intent."

The Court held that the shareholder could be made to pay back the moneys so received, although there was no fraud intended, saying: "We are not of opinion that in directing the payment of these dividends there was anything *fraudulent* on the part of the directory. They no doubt believed they were acting legally and properly. They supposed that profits existed when in reality there were none."

So in Dudley vs. Price, 10 Ben Monroe, 86, under a clause of a

charter similar in effect to the clause of Walker's will, the directors of a corporation "declared dividends where there existed no actual profits to divide, as appears to have been established by the Commissioner's report on file" The Court again held that "the fund which was distributed among the stockholders, under the name of *profits*, was in reality a *trust fund* in the hands of the directors *for the payment of debts*, and should have been *retained* by them for *that purpose*."

In Lex. Ins. Co. vs Page & Richardson, 17 Ben Monroe, 442, the Court held that where "profits" were wrongly declared, when there were none, the assignee of the company could recover it, although "the declaration of these dividends was undoubtedly made in good faith, although it was made under a misconception of what constituted the profits of the company, out of which the directors were authorized to make dividends.

"It would seem according to well-settled general principles, that if dividends were made under a misconception on the part of the directors of what constituted profits, and under a belief that there were profits to divide when in fact there were none, they might be reclaimed; because the stockholders who received them were not entitled to them, and they had been paid over and received under the operation of a mutual mistake."

In Evans vs. Coventry, 2 Jurist, New Series, page 563, and on appeal, 8 De Gex, McN. & Gordon, pages 845–839, the directors of an insurance company were authorized, by a deed of trust under which it was operated, to divide the profits among the shareholders. They declared and distributed as profits large portions of the funds on hand, without properly counting the risks of loss, and at a time when "the affairs of the company were in such a condition that it could not afford anything of the kind; not only that the event had not arisen on which alone there was power under the terms of the *deed* to declare a dividend, but that so far from that event having arrived, the concern was in a very serious, alarming and ruinous state." The Court there went into an examination of the correctness of the estimates on which the trustees or directors declared that there were profits; and found that the directors "had proceeded upon *wrongly calculated* tables, and that its affairs were consequently never in such a state as to justify the directors in declaring a dividend; they, however, for a series of years went on declaring and paying dividends of 5 per cent." (8 De Gex, M. & G., side page 839.) And the Court declared them erroneous, saying: "Now, assuming that they thought they were acting for the general benefit of the body whom they represented, and whose concerns they managed, it does appear to me that it was a most improper and unjustifiable mode of conduct." And the dividends were recovered.

In Scott vs. the Eagle Ins. Co., 7 Paige 199, the directors of an insurance company counted the premiums, paid in on running policies, as a part of the assets and thereby made the assets so large that it appeared there had been profits made; and a dividend was thus declared.

Chancellor Walworth held that as the said premiums paid in were *doubtful*, because some of the parties insured might die, and their policies have to be paid out of those premiums, they should not be counted in as a part of the assets. The Court made calculations to show that if those premiums had not been counted in, there would not have been any "profits" shown; and it was therefore held that the creditors were entitled to the sums so declared as profits.

To count in doubtful accounts receivable, which are liable to loss, is the same in principle as to count in premiums liable to loss.

In Wood vs. Dummer, 3 Mason, 308, a bank was about to quit business, and a large portion of the cash capital of the bank was paid out to the stockholders, on the idea that there were left assets enough in the form of open accounts, bills receivable, etc., to pay off the creditors. Judge Story held that inasmuch as those accounts, notes, etc., were "then outstanding, and the productiveness of which could not then be ascertained," such a division of cash was illegal; and he compelled those who had, in good faith, received the money, to pay it back.

In Brice's *Ultra Vires*, second American edition, page 205, it is said that under the English statute, providing that stockholders should be made to pay back any moneys "misapplied," recovery can be had of "dividends not merely when paid under a fraudulent balance sheet, but when paid under an account *negligently* made out." And in a note to the same page it is said that. "It is immaterial whether he (the shareholder) got it by fair agreement or by a wrongful act."

Those cases are based on very broad principles; and, while the anomalous circumstances of the present case forbid the expectation of finding exact precedents, there can be no difficulty in applying those principles to it; in the same manner as Judge Story, without exact precedent, first applied them to the case of corporate assets.

VI.

THE VALUE OF THE ONE-SIXTH INTEREST IN THE FIRM, WRONGFULLY WITHDRAWN.

The will, as we have seen, provided that Fred. K. Walker "is to have the privilege to purchase, at a fair valuation, upon reasonable time, such portions of my share in said concern and its good will, as will make his share equal to one-half. *What* he may so *pay* is to be divided as profits of the concern." On January 1st, 1873, Fred. K. Walker, in pursuance of that clause, purchased a one-sixth interest in the firm, to make his share equal to one-half. He *promised* to pay for it $20,295.70; for which sum he gave his promissory notes due in one, two, and three years. Immediately (January 1st, 1873), $20,295.70

of the capital fund of W. H. Walker's share was drawn out of the firm and distributed, in cash, among his devisees. This was in direct violation of the will; for the will only provided that "*what* he may *pay*" should be "divided." He "*paid*" nothing, then, or at any other time. They did not draw out his *notes*, but left them, and drew out the *cash*. By this procedure $20,295.70 of the trust fund, dedicated to the creditors, was taken by the defendants and converted to their own use. (Record, pages 29, 58, 66, 67.)

Fred. K. Walker was compelled to admit, under cross-examination, that this was a "mistake" which ought never to have been made. (Record, page 67, answers 54, 55, and 56.)

Walker says that he, long afterwards, "paid off" those notes by "declarations of profits." (Record, page 67, answer 56.) That is, he did not pay them at all, but afterwards *entered* them as paid by "profits" which he afterwards "declared" himself entitled to. That he is still owes the debt may fairly be inferred from the fact that he is still *indebted* to the firm in the sum of $28,220.44, "after getting credit for all the profits." (Record, pages 67 and 68, question and answer 63.)

That the withdrawal of this sum of $20,295.70 from the firm capital was wrongful, admits of no doubt. Nor can there be any doubt that, besides depriving the creditors of their rights, it tended to cripple the firm and thus defeat the testator's desire for its successful continuance.

The will evidently contemplated that the *capital* should not be *reduced*, even temporarily, by this transaction. Its design was that only the money Fred. should pay in should be withdrawn, which would, of course, leave the aggregate firm capital just where it stood before. That purpose was disregarded.

And the process by which Fred. K. Walker claims to have afterwards "paid" those notes only aggravated the matter. It amounted simply to "declaring profits" out of the capital to such an extent that Fred. K. Walker's half of them would cancel the notes. Of course the *estate's* half of those profits amounted to as much more, and they were *withdrawn*. Instead, therefore, of anything being paid in, as the will provided, that process only resulted in the estate drawing out as much *again* of the capital.

VII.

THE OVERDRAFTS.

The new firm of W. H. Walker & Co. acted as the "banker" of the devisees of the testator, receiving deposits and allowing withdrawals.

The deposition of W. C. Nones, an expert book-keeper, shows the amount of the overdrafts. (Record, pages 28 and 29.) That deposition was taken with the books before him, and in the presence of Fred.

K. Walker, and Walker does not dispute its accuracy, in his own deposition, taken later.

It is thus shown that, if we exclude from consideration, for the present, the sums which were put to the credit of the estate, on the firm books, as "profits," the estate overdrew its deposits as follows:

From the testator's death to August 9, 1872, the "estate" drew out, *over* and *more* than its deposits	$ 2,024 77
From August 9th to the end of 1872 the amount drawn out in excess of what was put in was	1,171 77
During the year 1873 the estate put in, more than it drew out, $8,766.00, if we count, as put in, the $20,295.70 (value of a one-sixth interest in the firm, spoken of *ante*); but as that $20,295.70 was *not* paid in, as we have seen, *ante*, we will, for the present, exclude it; and the amount drawn out, in excess of that put in, was	11,529 70
During the year 1874 the amount drawn out in excess of that put in was	39,649 75
Up to April 30 of the year 1875 (end of Ledger C), the amount put in, in excess of the amount drawn out, would be $7,568.42, if we count, as put in, the sum of $14,425.00 mentioned *post;* but as that $14,425.00 was not put in, as we shall see, *post*, the amount out drawn in excess of that put in was	6,856 58
From April 30 to the end of 1875 (Ledger D), the amount drawn out in excess of that put in was	10,536 46
During the year 1876, and up to the bankruptcy, February, 1877, the amount drawn out in excess of that put in was	2,754 20
Total	$74,523 23
Now, giving the "estate" credit for the amount of the "profits" for which it received credit on the firm books	50,889 53
There will be left, as the amount of the *overdrafts*	$23,633 70
And, giving the estate a further credit by the $20,265.70 (the value of the one-sixth interest in the firm, excluded above in speaking of the overdrafts for the year 1873), of which we have treated under a separate head, *ante*	20,295 70
The amount of *overdrafts* remaining will be	$3,338 00

(See questions and answers Nos. 10, 11, 12, 13, 14, and 15, on pages 28 and 29 of the Record.)

The item of $14,425 00, mentioned above, in speaking of the overdrafts for the year 1875, was, as Nones testifies, not paid in at all. (Record, page 29, answer to question 13.) It was, without any apparent reason, taken out of the capital fund on January 1, 1875, and placed to the credit of the "estate," and was so withdrawn by the devisees. Fred. K. Walker, though he had read Nones' deposition before giving his own, offered no explanation of why that was done. It was evidently a simple withdrawal of a part of the capital.

Under the principles laid down hereinbefore, the complainant is entitled to have an account of those overdrafts on the capital.

VIII.

THE TESTATOR'S DEBTS PAID BY THE NEW FIRM.

In the next place, the assignee is entitled, both by virtue of his assignment, and by the process of subrogation in behalf of the creditors, to recover back from the *general* estate of W. H. Walker, in the hands of his executors and devisees, the amounts advanced by the posthumous *new firm* in paying off debts of the old firm, or of W. H. Walker personally.

The answer in this case shows that "at the time of his death W. H. Walker was surety for divers persons, and the *new* firm of W. H. Walker & Co. carried said indorsements in the hope that the principals would pay in whole or part. But the parties finally (in 187–) wholly suspended, and the debts had to be wholly provided for by W. H. Walker & Co. as indorsers. Among said debts were those owed by James Kennedy, $9,000; William Keely, $5,000; John Cawein & Co., $7,000; John M. Stokes & Son, $3,500; J. M. Duncan, $900; L. W. Rasdall & Holmes, $700." [$26,100 in all.] (Record pages 20–21.) The truth of these allegations is established by Fred Walker's deposition. The new firm seem to have considered that the said debts were chargeable against the assets of the new firm, instead of against the estate of W. H. Walker. In this we contend that they were in error.

We have already seen that the death of W. H. Walker dissolved and ended the old partnership. The provisions of W. H. Walker's will, although they speak of "continuing" the partnership, were "in fact only bargains for the creation of a *new* partnership when the old one ceased to exist." (Parsons on Partnership, side page 439; 3 Kent's Comm., side page 57, *note.*)

When the old firm dissolved its liabilities were fixed on the general estates of the partners, as well as on the firm assets.

Now, whether that debt of $26,100 was a debt of W. H. Walker individually, or a debt of the old firm, the law is settled that if a *new* firm pays such a debt of an old firm, or of any member of the old firm, the new firm, and its creditors, by subrogation, are entitled to recover the amount so paid, from the estate of the retired partner. That doctrine is peculiarly applicable to this case.

Here the testator provided, by the preamble to his will, that his debts were all to be first paid. And, as his capital in the firm was "all" to remain therein, those debts were to be paid out of the *general* personal property of the testator. The devise of the firm capital stood in the attitude of a specific legacy; the debts were to be paid

out of the rest of his estate. None of his general estate was to be divided until all his debts were first paid; and, if so divided, it remained liable therefor, and was received subject thereto.

If the capital fund of the firm was to be diminished by paying off the "accommodation indorsements" of the testator, there would be little left to go into the new firm; instead of "all" being placed therein, as he directed. W. H. Walker's general estate being liable for those accommodation indorsements, and the trust fund having paid them off, it follows that the assignee of the new firm has the right, by law, and by the terms of the will, to recover of the estate its proportion of those liabilities.

In Cutbush vs. Cutbush, 1 Beavan, 187, a testator directed that his wife should *continue his trade capital* in his trade as a plumber, and carry it on until his youngest son should arrive at 21.

The widow so continued the business for several years, when she became insolvent; having spent all the capital fund, and also incurred £700 of debts.

The creditors of the posthumous trade alleged that the widow had used a portion of the capital "specifically directed to be employed in the trade," to pay off the debts of the *testator;* and they petitioned the Court to have the estate marshalled and to have them subrogated against the estate of the testator, in the hands of his executors, to the extent that the trade capital of the new firm had been used to pay off debts of his estate.

The Court (Lord Langsdale) held that "the petitioners *are entitled* to an inquiry, as to what has become of this portion of the assets."

In Laughlin vs. Lorenz, 48 Pa. St., 275, Lorenz and Stewart formed a partnership in 1853 for the manufacture of iron and nails. By the partnership articles, upon the death of either partner "the business of the firm was to be closed up in such manner as may be decided upon by the survivor and the personal representatives of the deceased partner." Lorenz died in October, 1854. The "manner of closing up" the business of the firm "decided upon by the survivor, and personal representatives of the deceased partner," was to create a new firm consisting of the surviving partner, and one of the decedent's executors and the decedent's son; to which new firm all the old firm's assets passed. The old firm had outstanding debts to the amount of $48,046.94, which were paid off by the new firm.

A creditor of the *new* firm sued the executors and devisees of the deceased partner in the old firm, to recover of them by subrogation the amounts which the *new* firm had paid out on the debts of the old firm.

The Court compelled the executors and devisees of the deceased partner to pay to said creditor of the new firm, out of the assets of the decedent's general estate in their hands, an amount equal to that paid out of the assets of the new firm upon the debts of the *old* firm, for which the decedent's estate was liable as a partner. The Court said: "The *new* firm, therefore, is clothed with the equities of the creditors

of the *old*, whose debts have been paid. The debts paid were claims not only upon the assets of the *old firm*, but upon the individual estate of *each partner*. It is this right to payment out of the estate of each partner with which the new firm became invested, and, being insolvent, can successfully prosecute in equity for the benefit of its own creditors." The syllabus of that case reads thus: "Where the mode of closing the business of the old firm is by the creation of a new one, composed of the surviving partner and the representatives of the deceased, the creditors of the new firm are clothed with the equities of that firm against the estate of the decedent, arising out of the payment by the new firm of the debts of the old."

In Pitkin vs. Pitkin, 7 Conn., 314, a testator provided by his will that his capital in his partnership should "be continued therein," and the firm business be carried on by his executor. The new firm broke, and the other partner claimed that a portion of the testator's debts had been paid out of the assets of the new firm. The Court said: "With respect to the indebtedness of the deceased, if he was indebted at the time of his death, the plantiff, after payment, might have contribution from the deceased's estate by a claim made on his executors."

IX.

THE ASSETS ON HAND ARE NO EQUIVALENT FOR THE TRUST FUND WITHDRAWN.

The learned counsel for the defendants endeavor to evade these arguments, by presenting a very curious theory.

They say that at the time the new firm failed it had on hand assets of the value of $96,357.90; and they contend that, as the fund left by the testator in the firm was only $89,721.59, therefore the creditors can not complain of the sums withdrawn, *even if they were wrongfully withdrawn*.

There are two answers to this theory.

In the first place, the said $96,357.90 of assets realized by the assignee, is not, in value or otherwise, the equivalent of the trust fund which the testator left in the firm. We have seen that the entire capital of the firm was drawn out of it by the defendants by the beginning of 1876, thus:

Drawn out as profits of 1872	$18,970 00
Drawn out as profits of 1873	36,927 91
Drawn out as profits of 1874	15,995 43
Drawn out as profits of 1875	23,561 83
Drawn out for F. K. W.'s one-sixth interest	20,095 70
Drawn out overdrafts	3,338 00
Total	$118,888 87

Besides, $26,100 were paid out on the testator's debts.

Before the beginning of 1876, therefore, the firm capital was gone, and the concern was "treading on air." It was then living on credit, using funds obtained from its creditors, and had no assets of its own, if a balance had been struck. Walker testifies that in 1876 "the firm credit being good at almost any bank in the city," down to the very "time of its failure," they "discounted a great deal of paper with all the banks." (Fred. K. Walker's dep., page 71, ans. 1, on re-cross-examination.) It is shown, too, that the $198,323.72 of indebtedness now existing, is all "dated in the fall and winter of 1876, and in the winter and early spring of 1877." (Record, page 71.)

It is obvious, that having drawn out all of the firm capital, that tremendous debt of $198,323.72 was partly incurred by thus raising money in the banks, in order to supply the place of the original capital which had been so withdrawn.

The money so raised was used to obtain the assets which were on hand when the firm went into bankruptcy. Indeed, those assets were pledged to the extent of $57,423.22 to secure the prepayment of that indebtedness; and, for the unsecured indebtedness of $174,896.47 (including the indorsements for Walston), only $38,914.68 of those assets were tangible; giving them only thirteen cents on the dollar of their debts.

If that capital fund of the testator, $89,721.59, had been left there, as it should have been, there would have been at least $128,-636.27, for the unsecured creditors, without counting Fred. K. Walker's portion of the capital. To contend that, under such circumstances, the creditors, who became such in reliance on that capital fund, "can not complain" is, we repeat, a very curious theory. They certainly do complain that the trust fund, set apart for them, has been taken by the defendants, and that in the place of that free and unencumbered fund they are given a fund encumbered by the debts incurred in creating it, to an extent of more than its value.

In the second place, the principles laid down by the authorities we have cited can not be thus evaded.

If the "capital and interest" of the testator was a trust fund, and if it was in fact "chargeable for the debts and liabilities of the firm," and if the creditors have a lien on it, it is no answer to their claim, that some assets are left, though the *original trust fund* is gone.

When the defendants drew out that trust fund, to which they were not entitled, they became liable to make restoration to the extent of the trust fund so received. They have never paid back that trust fund, but still hold every cent of it.

How, then, can they hold on to that trust fund by showing that there are *other* assets of the firm? How can they contend that they should be allowed to keep that trust fund, because the firm afterwards, by incurring an enormous liability, obtained other assets which that liability will more than consume?

Suppose the concern had stopped business at the exact time that all

of its capital had been withdrawn by the defendants, and without obtaining those additional assets, would those who had withdrawn the trust fund be allowed to keep it?

And, can it change the case that new assets are obtained from other sources, burdened with a correspondingly increased indebtedness thereby incurred? Is the capital made any the less a trust fund? Was its withdrawal any the less in violation of the trust? Are the defendants any the less volunteers? Have *they* restored any portion of that trust fund? Do they any the less hold that to which they are not entitled?

The fact that there are *other* assets than the original capital fund does not remove the *trust* from the capital fund. On the contrary, the only effect is that the additional assets likewise become affected with the same trust. They, as the product or acquirement of the original capital, or of the credit established upon the original capital, are also chargeable with the debts of the firm. The creditors have the right to look to all the assets of the concern.

"It is manifest that *every part* of these assets stood bound by the contracts which had been made with the bank upon the funds thus set apart by the charter." (Curran vs. Arkansas, 15 Howard, 315.) In that case, Judge Curtis, for the Court, held that there was an implied *contract* on the part of the *stockholders*, with the *creditors*, that the corporate assets should remain in trust for the payment of the debts of the concern.

It sounds strange to hear it seriously argued that because an insolvent corporation has some assets left, those who have wrongfully received portions of its capital can not be made to restore it; or that because a trustee has some assets in his hands (obtained by creating corresponding trust debts), the *cestui que trust* can not inquire what has become of the original trust fund.

It should suffice, then, as an answer to this theory, to remember that the $89,721.59 which the testator left in the firm was a trust fund for creditors; that the defendants have withdrawn it and still hold it; that there are creditors to the extent of $174,896.47 still unpaid; and that the $38,914.68 of assets, to which alone they could look, were so covered by debt that they were only paid thirteen cents on the dollar.

Surely this Court will not turn creditors away, and permit mere volunteers to hold on to the fund upon which those creditors have a lien.

X.

THERE WAS NO "DISCRETIONARY POWER" IN FRED. K. WALKER.

Another specious theory of the learned counsel for defendants, is, that even if the capital was wrongfully distributed as profits by Fred. K. Walker, it was done under the execution of a *discretionary power*

conferred on him by the will of W. H. Walker; and that a *discretionary* power can not be reviewed, except for fraud.

But, in the first place, there was no such *discretionary* power in Fred. K. Walker.

"Courts do not favor constructions that confer upon trustees absolute and uncontrollable powers." (Perry on Trusts, Sec. 511, *a.*)

The will of W. H. Walker only provided that the profits should be "ascertained" and "divided." It did not say who was to "ascertain" them. Nor did it say that the person who should divide the profits might, in his discretion, divide out the capital by calling it "profits." On the contrary, it expressly provided that only the profits should be divided, and that they should not be divided until they had first been ascertained to exist; and that the *capital* should, under no circumstances, be divided until the firm was discontinued.

The will was as explicit that the capital should *not* be divided, as it was that the profits should be. The word "discretion" does not appear in the will; nor any equivalent phrase. The question as to whether there were profits, was a question of fact, the existence of which was in no wise dependent on Fred. K. Walker's fancy. There was, as we have seen, a proper and legal mode of ascertaining whether or not the fact existed. The will required it to be "ascertained" in that proper and legal mode. Fred. K. Walker did not pursue that mode, but adopted an illegal and improper one, and thereby violated the will and dissipated the capital.

"The general rule is rigidly adhered to, that powers can be executed only in the *mode* and at the time and upon the conditions prescribed in the instrument creating the power or trust." (Perry on Trusts, sec. 511, *b*, and 254.) "If the manner of its execution is *not* pointed out, it must be executed, in good faith, in the usual manner of doing the business to be done under the power." (*Ibid.*)

Fred. K. Walker then stood in a position analogous to that of a trustee who is directed to preserve a principal fund for a remainderman and to pay over the income to a life-tenant. In such a case, it can not be doubted that the Court will analyze the trustee's accounts, and, if it is found that he has given any of the principal fund to the life-tenant, or any of the income to the remainderman, it will correct the error and restore the fund to the proper party. And there is no more "discretion" in the one case than the other.

So, in like manner, if a trustee is directed to collect the proceeds of mortgaged property, and to pay it to the lien holders according to their priorities, and he makes an error in "ascertaining" the priorities, it will be corrected. So if an executor is directed to "ascertain" all the creditors, and pay the personalty to them, and he, through mistake, pays the money to the distributees without properly ascertaining whether there are creditors, it cannot be doubted that in all such cases his action can be reviewed. (Perry on Trusts, section 254; Story's Eq. Jur., section 1,251.)

And so, the directors of corporations are trustees, with a power to

"ascertain and declare the profits;" but, as we have seen, if they distribute the capital as dividends the Courts will review their exercise of the power, and compel the restoration of the trust fund. (See Gratz vs. Redd and other cases, *supra.*) In none of those cases, nor in this, can any such "discretionary" power be claimed.

Indeed, if there was any "power" in Fred. K. Walker, it was a "*power coupled with a trust.*" In such cases, the Courts will not permit any erroneous exercise of the power; and the whole matter is subject to the review of the Chancellor. (Perry on Trusts, section 248.)

In the second place, suppose this were a case of a mere *discretionary* power. The right of the creditors to recover the trust fund, when wrongfully paid to volunteers, would be none the less clear.

It is conceded by the learned counsel for defendants that even a *discretionary* power may be reviewed where the mode of its exercise is illusory, or such as to amount to a fraud on the power.

If *actual* fraud were essential, we might well contend that the knowingly counting in of debts already charged off to profit and loss; the compelling the book-keeper to charge back large sums which he had charged off to profit and loss; the failure to make out any profit and loss account for the year 1875, and the division of $95,000 of the capital as profits in three years and a half, by these means, constitated such *actual* fraud; without considering the overdrafts, and the withdrawing of the $20,295.60, as paid for Fred. K. Walker's additional one-sixth interest in the firm, when he had not paid it. The allegations of the bill, too, while necessarily general, and not using the *word* fraud, contain averments of facts sufficient to show it.

But *actual* fraud is not essential. To constitute a fraud on a power it is only necessary that the trustee shall have disregarded the purpose of the creator of the power by exercising his discretion in an "improper" way. (Perry on Trusts, sections 511, and 511, *a.*) There may be a constructive fraud as well as an actual fraud.

A power may be thus improperly executed from improper motives; or it "may have been improperly exercised by the donee of the power, induced thereto by motives commendable in themselves, as by filial obedience or affection." (Perry on Trusts, sec. 511, *a.*)

All such improper exercises of powers are treated in equity as in effect frauds, actual or constructive, on the power, and are therefore void; and Courts of equity will, unless some bona fide purchaser for value has intervened, "relieve the parties from consequences of an improper exercise of the discretion." (Perry on Trusts, sec. 511.)

If the execution exceeds the limits of the power it is void as to the excess only; but if a fraud on the power it is void *in toto.* (Aggasiz vs. Squire, 18 Beavan, 431.)

In Pulpress vs. African Church, 48 Pa. St., 210, the Court say: "If there were a positive transgression, or if the fund were *continuously* applied in such a manner as to lead to the conviction that the selfishness of the trustees rather than the design of the founder of the

charity had become the rule of appropriation, or if it were manifest that their honest discretion is not exercised, it might become the duty of the Court to interfere." In short, the Courts will review any "*abusive*, fraudulent, collusive, *illusive*, or other *improper* exercise of a *discretionary* power." (Perry on Trusts, section 511, *a*, second edition.)

To draw out all the capital and bankrupt the firm, in violation of the trust for creditors,and in violation of the will of the testator that the capital should remain so that the firm might continue, is certainly within that category.

In the great case of Topham vs. The Duke of Portland, the Duke of Portland was given a discretionary power to appoint a fund between his two sisters or to appoint it to one in exclusion of the other. He made the appointment to one sister, apparently in accordance with the power, but in such an improper way as to evade the purpose of the donor of the power; (as in *this* case the division of the capital as profits defeated the testator's purpose of having the firm creditors paid, and of having the firm continue until his youngest child was of age.)

The Master of the Rolls held that this was, in law, a fraud on the power; and his opinion was on appeal affirmed by the Lord Chancellor, and, on further appeal, by the House of Lords. (31 Beavan, 525; 1 De Gex, Jones & Smith, 517; 11 House of Lords cases, 54.)

The improper mode of executing the discretionary power there was not adopted from any motive actually fraudulent, but from motives of kindness; but the Court held that as the course adopted was "not warranted by the power," but was "beyond its purpose and intent," it was, in effect, a fraud on the power "whether the *motive* was right or *wrong*." (1 De Gex, J. & Sm., 571.) The House of Lords said: "They have been mistaken in their view of the law; they believe that they had the right to do that which they have done, and therefore they *honestly* did it." (11 House of Lords cases, side page 60.) Yet, they held it to be a fraud on the power.

And the Court there held that "a title can not be derived under a fraud upon a power, in the absence of *valuable* consideration." (1 De Gex, J. & Sm., 517.)

XI.

A REFERENCE TO THE MASTER IS NECESSARY.

The complicated character of this case, the necessity for an accurate investigation and exact calculation as to the amount of false "profits" and overdrafts received by defendants, and of the amounts paid out upon debts of the testator, show the importance of a reference therein.

In such cases, exact allegations and proof of the account are not

expected or required, in chancery practice, on a submission which is to construe the will and settle the principles upon which the account is to be afterwards properly made up.

XII.

THE EQUITIES.

Generally, the creditors of a testator have the right to subject to the payment of their debts all of his estate and assets, wherever found.

Generally, if a testator directs his executor to do anything, his whole estate is liable to the expenses and charges of doing it, and will, if necessary, be taken from his devisees and applied thereto.

These defendants are, therefore, favored beyond all other devisees in not having the general assets, received from the testator, taken from them, to be applied to the satisfaction of debts thus incurred by the personal representative of the testator, in carrying out the express directions of the testator's will. Here, by an anomaly, the devisees are permitted to hold and enjoy the large estate of the testator, while those who have been made creditors by the execution of the testator's will, remain unpaid; and this, although the will was being so executed for the exclusive benefit of these devisees. Surely this is enough of favor. Surely these creditors under the testator's will should not have to stand empty-handed and see the devisees also retain and enjoy the earnings, if any, of the posthumous firm; or its capital fund, drawn out secretly under various guises.

If this concern had prospered, the devisees, and they alone, would have been enriched; and that, too, without any labor or risk of theirs. As it turned out a failure, they have simply made nothing by it. They are not injured. They have only been disappointed in not getting more. Had they not sapped it by secretly withdrawing its capital, the concern might not have fallen as it did.

When the sums they have drawn out in so many devious ways have been restored by them, they will have suffered no loss. They will have still all that they were ever entitled to. They will have all that they had before they committed these wrongs—the large general estate of the testator—while the many creditors will still be more or less unpaid.

We, therefore, respectfully submit that the Court below erred in holding that "the equity is for the defendants," and we ask a reversal of its decree.

BIJUR & DAVIE, for Appellant.

W. O. & J. L. DODD,
GEORGE WEISSINGER,
BIJUR & DAVIE,
} Counsel.

Martin Bijur
W. O. Dodd
Counsel for Appellant

SUPREME COURT U. S.
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Supreme Court of the United States.

OCTOBER TERM, 1880.

NO. 542.

STEPHEN E. JONES, ASSIGNEE OF W. H. WALKER & CO., - - - - - - APPELLANT.

VERSUS

W. H. WALKER'S EXECUTORS, ET AL., - - APPELLEES.

BRIEF FOR APPELLEES.

JOHN MASON BROWN,
Counsel.

J. C. WEBB, PRINTER AND STATIONER, 79 FIFTH STREET, LOUISVILLE, KY.

Supreme Court of the United States.

OCTOBER TERM, 1880.

NO. 542.

STEPHEN E. JONES, Assignee of W. H. Walker & Co., - APPELLANT.

vs.

W. H. WALKER'S EXECUTORS, ET AL., - - - APPELLEES.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

W. H. Walker was a prosperous liquor dealer in the City of Louisville, Kentucky.

In the year 1868 he took, as a partner, his son Frederick K. Walker, to whom he gave an interest of one-third in the business.—The firm so constituted was called "W. H. Walker & Co.

In 1872 W. H. Walker died, leaving a will by which he disposed

of his entire estate, except so much of it as was then embarked in the commercial business of the firm. His interest in the firm of W. H. Walker & Co., he directed to be continued in trade, and with that view the 8th clause of his will provided as follows:—

"It is my wish that my son, Frederick, carry on the business "of W. H. Walker & Co., in that name and style, and in my store- "house where it is now carried on, giving him power to change "the place, until my youngest child living to be twenty-one years "of age arrives at that age, or for a shorter time if he does not find "it profitable. To that end all my capital and interest in said con- "cern shall be continued therein, and shall be chargeable for its "debts and liabilities, but my other property shall not be so charge- "able. While Frederick carries on the said business, my share "shall pay the salary of an efficient man to aid him therein, or he "shall have compensation for his services as to and from my share. "—Agents and employees of the concern are to be paid by it.— "Frederick is not to be charged with the five thousand dollars ad- "vanced by me to him on his coming of age, and he is to have the "privilege to purchase, at a fair value and upon reasonable time, "such portion of my share in said concern as will make his share "equal to one-half. What he may so pay is to be divided as profits "of the concern. While my storehouse is occupied by the concern "it shall pay rent therefor.—The profits of said concern, which "shall be ascertained and declared on the first of January after my "death, and annually thereafter, shall be divided between my wife "and children, or their descendants and others, as my personalty "is to be divided between them.

"When my youngest child living to be twenty-one years of age "arrives at that age, or at the death of my son Frederick before "that time, or when he discontinues the business, my interest in "the concern and its good-will shall be sold as my executors shall "direct, and the proceeds divided as the profits thereof are to be "divided, with an obligation, if possible, that the business may be "carried on under the old name and style."

[Printed Record page 11.]

Frederick K. Walker was named as one of the Executors, and duly qualified as such. The business of the estate was, it appears, with perhaps a single transaction, exclusively conducted by him.

The death of W. H. Walker occurred on the 2nd of May, 1872, and was immediately announced, by circular letters, to all the business correspondents of the firm, with a special note that the new business would be carried on under the provisions of W. H. Walker's will. The same facts were advertised, and made the subject of editorial comment in the Louisville newspaper of largest circulation.

[Printed Record page 55.]

Frederick K. Walker in pursuance of the directions contained in his father's will, as just quoted, with the assistance of the book-keeper of the firm, and having before him the correspondence of attorneys and other collecting agents, drew off a trial balance at the close of the year 1872, and (after charging off what he considered bad assets) declared the profits of the year. In each succeeding year, a similar course was pursued—except that no profits were declared in 1876.

[Printed Record pages 56 and 57.]

A share of these profits was, after their declaration, credited to the estate of W. H. Walker, deceased, and, so far as needed, paid out to the widow of the testator, guardian of his infant children, and to others entitled under the will. It was consumed chiefly in living expenses, and was paid out by F. K. Walker, who was the only executor that handled or disbursed these funds.

[Printed Record page 57, question 22.]

Under the privilege of purchase given him by the will, Frederick K. Walker, bought a one-sixth part of the business, to make up his original one-third to a full half. He gave his notes aggregating $20.295 90, which he paid as they matured, by passing to the credit of W. H. Walker's estate such part of his (F. K. W's.) profits as fully met them. This sum was, under the will devisible to the widow and children as profits.

The reception of these notes seems to have been the only executorial act performed by any save Fred. K. Walker. The accumulation of declared profits, credited to the estate of W. H. Walker on the firm books, was employed by F. K. Walker in the business of the firm, and in addition to this credit he, as executor, deposited with the firm, as bankers for the estate, very large sums collected by him. These credits exceeded $54.000.

[Printed Record page 61, question 65.]

Besides the creation of debts in the ordinary business of the firm and for its legitimate uses, F. K. Walker, without consulting with his co-executors or any of the appellees, extended assistance in a large amount to other persons and firms, and used the firm name, on bankable paper for that purpose.

In this way a liability for Gardner & Co., was incurred and

paid in the year 1876, after the last declaration and division of profits, amounting to about $50.000.

[Printed Record page 59, question 38.]

In a like manner a loss of $26.000 was incurred and paid by indorsing the firm name for parties whom W. H. Walker had formerly assisted.

[Printed Record page 62, question 71.]

Fred. K. Walker himself fell in debt to the firm in the sum of $28.000.

[Printed Record page 67, question 63.]

The firm also incurred liability as indorsers for Thomas Walston, an insolvent, exceeding $33.000.

[Printed Record page 60, question 50, and page 31, question 20, at end.]

These accommodation indorsements and their payment by F. K. Walker out of firm assets brought the firm to insolvency. But for these losses it would have paid every liability.

[Printed Record page 60, question 51.]

On 28th February, 1877, Fred. K. Walker filed a petition in bankruptcy in the name of "W. H. Walker & Co., a firm composed of F. K. Walker, and the estate of W. H. Walker, as limited and defined by his last will."

After adjudication in bankruptcy and surrender of assets, the creditors of the insolvent firm directed the assignee to bring this action, in which it is sought to subject the estate of W. H. Walker to the payment of firm debts, and to compel satisfaction from the legatees, on the ground that the profits declared and distributed were not in fact profits, but were erroneously so declared by the managing partner.

All the creditors who have proved debts, and whom the assignee represents in this suit, are holders of debts created nearly a year after the last declaration of firm profits.

This is agreed by stipulation of record.—

[Printed Record page 72.]

There is no charge that the declaration or distribution of profits was with any fraudulent intent, or with any purpose of making a false show of profit at the expense of the capital funds. Fraud is neither charged nor proved. It is distinctly disproved.

[Printed Record page 57, question 14.]

The amount of capital invested by W. H. Walker in the posthumous firm was, as is charged and admitted. $82.774 59. The total firm capital, by a later valuation, (one sixth being $20.295 70) may be assumed as $121.774 20.

The assets reduced to cash, by the assignee at the time of the bringing of this suit amounted to $96.357 90.

This is the net remainder after charging off all items considered, by the assignee, to be uncollectable. The proof shows however that much of the condemned mass of assets is in fact available if properly pursued.

[Printed Record page 64, question 13.]

The appellees rely upon the following

Points and Authorities.

1. The testamentary limitation of liability declared by W. H. Walker, is well sustained by authorities.

   Ex parte Garland, 10 Vesey, 110.
   Burwell vs. Mandeville's Ex'r, 2 Howard, 560.
   Smith vs. Ayer, 101 U. S., 320.

2. Parties dealing with the firm of W. H. Walker & Co., after the death of W. H. Walker, must be held to a full knowledge of all the limitations and powers of management embodied in the will.

   Ex parte Garland, 10 Vesey, 110.

Ex parte Richardson, 3 Maddox, 79.
Burwell vs. Mandeville's Ex'r, 2 Howard, 560.
Smith vs. Ayer, 101 U. S., 320.
Cutbush vs. Cutbush, 1 Bevan, 188.

3. The power to declare annual profits was a personal power reposed in F. K. Walker, the named manager of the firm business. It remitted the subject wholly to him. The *exercise* of the power was mandatory, but there was an attendant *discretion* vested in F. K. Walker, in so far as computations or valuations were needed to fix the amount of profits.

Brown vs. Higgs, 8 Vesey, 569–570.

4. Inasmuch as all the now creditors became creditors of, and had their dealings with, the posthumous firm, *after* the last declaration and distribution of profits, they must, as knowing the provisions of the will, be held to knowledge that annual profits had been declared and used. They cannot, as subsequent creditors, complain if the managing partner, in former years had (without fraud) erroneously estimated certain assets as good which the assignee in bankruptcy now finds it difficult to collect. The rights of "subsequent creditors" of a posthumous firm are clearly distinguishable from those of other creditors.

Ex parte Garland, 10 Vesey, 110.

5. The now creditors, being informed in the premises, by the will, had the option to extend or refuse credit. They were in a position to demand a full exhibit of the business, its books and its assets, had they chosen. They waived their right, and thereby agreed to credit the firm as they found it.

Ex parte Garland, 10 Vesey, 110.
Burwell vs. Mandeville's Ex'r., 2 Howard, 560.

6. The management of the partnership was, it is true, a trust in the hands of F. K. Walker; but it was a trust coupled with a duty of declaring profits and a discretion in estimating them. The exercise of that duty and that discretion was imperative. The performance of such duty was (in the absence of fraud) conclusive on all taking benefit by or under the devise. And the trust power having been completely executed, and the discretion fully exercised long anterior to the creation of the debts now represented, a Court of Equity will not now interfere.

Brown vs. Higgs, 8 Vesey, 570.
Perry on Trusts, Sec. 508, ad finem.
Hill on Trustees, side page 488, and notes.

7. The original firm capital, as estimated soon after W. H. Walker's death, was $121.774 40. It is clear that this was impaired by commercial losses and not by withdrawal of funds on the part of any of appellees—for

The loss through Gardner & Co. [Record page 59,] was	$48.800 26
The loss through other indorsements [Record page 62,] was	26.100 00
The cash realized from surrendered assets [Record page 45,] was	96.357 90
Making a total of	171,258 16
And showing an excess over the capital,	121.774 40
Of	$49.483 76

Much more than accounting for the entire capital.

8. The insolvency of the firm was due to the accommodation indorsements, in the firm name, which were paid. But for that the insolvency would not have occurred. [Record page 60.] These payments were made after the last declaration of profits. If the amount so paid ($48.800 26) be added to the cash assets realized

by the assignee, ($96.357 90,) the sum ($145.158 16) largely exceeds the invested capital.

9. But the capital invested and made liable for firm debts by W. H. Walker, was only two-thirds of the total capital, or $82.774 59; and the directions of the will cannot be so tortured as to impose a duty of preserving more than that sum intact. If this be so, the appellant is without cause of complaint, for much more has come into the assignee's hands. [Record page 45.]

10. The case of a partnership such as this, created and carried on under the provisions of a deceased partner's will, is not to be confounded with that of limited partnerships *inter vivos*, nor with corporation cases.

Lindley on Partnership, side page 884.

Analogies drawn from such sources are deceptive. In such cases the law subjects assets which it will not touch in the case of a testamentary partnership.

It is not by any *implication* of law that reclamation can be had upon the general estate of the testator. Nothing short of actual fraud alleged and brought home to the distributees can (it is conceived) authorize a Court of Equity to call upon the general estate. As this Court has said:

"Nothing but the most clear and unambigious language, "demonstrating in the most positive manner that the testator "intends to make his general assets liable for all debts contract-"ed in the continued trade after his death, and not merely to "limit it to the funds embarked in that trade, would justify the "Court in arriving at such a conclusion."

Burwell vs. Mandeville's Ex'r., 2 Howard, 577.

11. The case at bar comes well within the rule *ab inconvenienti* laid down by Lord Eldon and followed by Judge Story. To grant the

prayer of appellant's bill of complaint involves and necessitates the recalling of legacies and devises satisfied years ago.

The appellant demands - - -	$77.276 77
The total general estate undistributed may be taken on the basis of the rentals, (interest at 4 per ct.) as amounting to not more than [Record page 60,] -	42.000 00
Leaving - - - - - -	$35.276 77

to be recalled from the legatees and devisees who have been settled with. And in this view, the case at bar falls precisely within the reasoning of *Ex parte Garland, Ex parte Richardson,* and *Burwell vs. Mandeville's Ex'r.*

12. The case of *Hankey vs. Hammond,* reported in the note to 3 *Maddox 148,* has long since been "completely overturned" as remarked by Judge Story (*2 Howard 560.*) It is too late to attempt its rehabiltation. The most ingenious efforts in that direction go no further than to try to reconcile some of its points with the now universally accepted doctrine of *Ex parte Garland.* The discussion by Mr. Justice Turner in *McNellie vs. Acton, 4 De Gex McNaughton & Gordon, 744,* has no further scope.

REMARKS.

The right of a testator to prescribe the terms upon which the whole or any part of his estate may be used in a commercial venture is firmly established. It will not, at this late day, be disputed that he may limit the amount of the fund to be jeopardised, may dictate the manager and the mode of management, and prohibit his general estate from suffering any loss, should the particular venture be disastrous.

In view of the two chief authorities on this subject (*Ex-parte Garland, 10 Vesey 110,* and *Burwell vs. Mandeville's Ex'r, 2 Howard 560.*) it may be taken as an established principle of law that it is competent for the testator to embark the whole or any part of his estate in a business to be carried on after his death. He may embark a part, and bequeath or devise the rest. He may restrict the liabilty of his estate in any way, or to any amount that judgment or caprice may dictate. He may so provide as to secure for his general estate or for his legatees the fullest participation in profits and at the same time prohibit a sharing of losses. He may prescribe who shall be the manager of the business, and define the methods of management. He may hedge the management of the business with such restrictions, safeguards and powers as to reduce the possibility of a loss to a minimum, while leaving the amplest opportunity for profit.

And this is so thoroughly settled that all intendments which would if indulged put the general estate, or distributed legacies in jeopardy, are sternly rejected. No liability of the general estate will be *presumed.* No claim against it or any distributed legacies will be entertained upon any *inference* of liability. The general estate will be held for firm debts incurred in the posthumous trade, only when the testator has distinctly and clearly so directed. In the absence of any declaration on that subject in the will, all intendments are absolute and conclusive against *any* liability whatever.

> "*Nothing but the most clear and unambiguous language, demon-*
> "*strating in the most positive manner* that the testator intends to
> "make his general assets liable for all debts contracted in the con-
> "tinued trade after his death, and not merely to limit it to the
> "funds embarked in that trade, would justify the Court in arriving
> "at such a conclusion, from the manifest inconvenience thereof,
> "etc."
>
> *Burwell vs. Mandeville's Ex'r, 2 Howard 577.*

This declaration of the law has been recently repeated, *ipsissimis verbis,* in *Smith vs. Ayer, 101 U. S. Reports, 320.*

It is manifest therefore that the testator's will is the charter of the new partnership. All the rights of all concerned are to be ascertained from it. Not only are the parties in the venture controlled by it, but all who deal with the posthumous firm are held to the fullest knowledge of its provisions and bound by its directions and limitations. They

are bound too by its *silence* on the point of liability, and where it is silent cannot pursue the general estate or the legatees.

And here will be noticed the fundamental difference between such posthumous partnerships, conducted under testamentary authority as the one under discussion, and all other commercial ventures. In all ordinary partnerships, in the great majority (if not all) of limited partnerships *inter vivos*, and in the bulk of cases of chartered corporations, the rule is different, and assets beyond those embarked, profits divided, dividends improvidently declared may be pursued and recovered as well by creditors extending credit after the distribution as by those who gave credit before. The cases are numerous, but arguments and analogies drawn from them are inapplicable and deceptive; for in none of such classes of cases does the rule announced in ***Burwell vs. Mandeville's Ex'r, 2 Howard,*** prevail. In none of them does a lack of clear and unambiguous language charging the distributed assets, work their release. No where does that rule prevail save in the case of testamentary partnerships.

The most ingenious efforts of able counsel have been unsuccesfully expended in the attempt to establish the analogies from ordinary and limited partnerships *inter vivos*, and corporation cases. The Courts have in each case refused to recognize them.

In the single instances of *Hankey vs. Hammock* (reported in the note to *3 Maddox Report 148*,) Lord Kenyon yielded to the argument; but that case "*has been completely overturned by other later cases, and expressly overruled by Lord Eldon in 10 Vesey 110, 121, 122, where he stated that it stood alone, and he felt compelled to decide against its authority.*" (*See 2 Howard 576 ad finem*).

The arguments of counsel as indicated by the reporter's abstracts in the cases of *Ex parte Garland 10 Vesey*, *Ex parte Richardson 3 Maddox*, and *Burwell vs. Mandeville's Ex'r., 2 Howard*, show how strenuously the false analogy has been urged. The opinion of the Court in each case, rejects the contention.

It follows that cases of reclaimed corporation dividends, instances of reclaimation of profits from a limited partner, *inter vivos*, and the like, are not entitled to weight as authority bearing on the case at bar.

It will be observed that the bill of complaint contains no charge of fraud either on the part of Fred. K. Walker in ascertaining, declaring and paying out profits, or in any legatee in receiving them. No collusion is averred. The bill does not embody even a formal confederating clause.

There is not the slightest proof of actual or intended fraud nor of collusive dealing. On the contrary the methods pursued in ascertaining the profits of the firm are affirmatively shown to have been straight forward and usual. A trial balance sheet was prepared at the close of each year, the book-keeper and salesmen were conferred with in fixing valuations and the results plainly posted to the proper ledger accounts.

[Printed Record page 57.]

The complainant's bill though drawn with much liberality of assertion, (especially as to the first and second counts), was so obviously contradicted by the exhibits filed with it, that on hearing of the cause the first and second counts were avowedly abandoned. The case rested in the Circuit Court and is brought hither on the idea that the profits declared were in fact not profits, but operated to diminish the capital invested in the business by W. H. Walker, and that Fred. K. Walker's error of judgment, in making his estimates, warrants a recall from the legatees.

It is contended for the appellees that there was no diminution of invested capital except through purely commercial losses, and that there came to the assignee in bankruptcy in actual money an amount largely in excess of the sum put into the firm by W. H. Walker's will. And further, it is insisted that in no such state of fact as that shown in this record can the appellant claim relief in a court of equity.

The appellant has introduced but one witness and his testimony is entirely confined to his opinions as an expert, formed from an inspection of the firm books. He does not pretend to any knowledge of the business or its management derived from any other source. Indeed the whole of the appellant's evidence amounts at best to a criticism on Fred. K. Walker's judgment as a business man, and is of that kind which is always abundantly wise after the fact. It is unneccessary perhaps to note with particularity the quantity of assets, in the shape

of open accounts, which the assignee in bankruptcy seems to have promptly charged off as utterly worthless. The history of the bankruptcy proceedings as shown in this record is the old and familiar one of wrecked estates. Scarce any money seems to have been gotten in beyond what came from whiskies and other property requiring little effort or skill in its sale. The insurance, gas and bank stocks were sold at ruinous rates.

[Printed Record page 33, question 29.]

Fixtures went for almost nothing, and the entire rectifying apparatus sold at $176 60.

[Printed Record page 33, question 30.]

Every account that seemed to promise difficulty in its collection appears to have been promptly written down "worthless." [Record pages 41, 42, 43, 44 and 45], and the assignee's work thus reduced to the care and commissions attending the least troublesome assets. And this, notwithstanding the fact that the bulk of the accounts are regarded by Fred. K. Walker and those best informed as collectable. [Record page 64, question 13.]

Naturally enough such a course (and the assignee only did what all assignees in bankruptcy do) cut down the realization of funds. Instead of amounting to $151.282 52 as estimated in the bankrupt's schedules, the assignee got in only $96.357 90, [Record page 45, memoranda at foot.] net cash for creditors. How the assets were slaughtered will best be appreciated by reference to the answers of appellant's witness. [Record page 30, questions 18 and 19.] And even under such administration there came out of the fire a fund largely in excess of the partnership venture under W. H. Walker's will. The fund made liable, by his will, for the firm debts was more than kept intact.

W. H. Walker's interest in the firm, as ascertained by an inventory taken a few days after his death was $82.774 59: so the bill charges, [Record page 4.] and so the answer admits, [Record page 18.] And so, leaving out of view the reduction of W. H. Walker's venture to a one-half through $20.295 70 paid by F. K. Walker for a one-sixth part of the business. [Record page 19] it will at a glance be seen that

so far from there being an impairment of the testamentary capital fund there was - - - $96.357 90 assets cashed

less - - - - - 82.774 59

or - - - - - $13.583 31

surplus over and above the "guaranteed capital," as it is termed by appellant.

Again, if to the assets in cash - - - - $96.357 90

Be added the losses incurred by indorsements for Gardner, debt and interest paid in 1876, [Record page 59, question 40] - - - 48.800 26

There results the sum of - - - - - **$145.158 16**

which is greatly in excess of the entire firm capital, as well that ventured under W. H. Walker's will, as that owned before by Fred. K. Walker. From the sum paid by F. K. Walker for a one-sixth interest ($20.295 70) the entire business capital may be put at $121.774 20.

There were other firm losses in large amounts, for example $26-100 by indorsements for persons whose paper W. H. Walker had formerly indorsed. [Record page 62, question 71.] It thus appears conclusively, that whatever may have been the wisdom or unwisdom of Fred. K. Walker's conduct of the firm, the entire "guaranteed capital" is produced and turned over to the creditors. It is submitted that this fact is a full answer to appellant's claim. All that W. H. Walker put into the firm is accounted for in cash.

Another aspect of the case may be noted. All of the creditors of the firm of W. H. Walker & Co., hold debts created "subsequent "to the several declarations of the profits, or alleged profits, of "said firm, and subsequent to the distribution, paying over and re-"ception of such profits, and none of said debts or claims against "said firm were in existance at the time profits were declared or "divided by said firm of W. H. Walker & Co., or any partner "thereof." [*Record page 72, stipulation of facts.*] These creditors

therefore came in and extended credit after everything of which they complain had been done and put to record. Their debts post-date the last distribution of profits by nearly a twelve month. They profess to have relied upon the credit of the testator's estate, and in so doing the law required them to look to the will. (*Cutbush vs. Cutbush. 1 Bevan, 184.*) They are held to full knowledge of all that the will contains, because the "convenience of mankind" and the established rules of law make it indispensible.

Ex parte Garland, 10 Vesey, 122.

Such being the case these creditors knew, *before extending credit,*

1. That Fred. K. Walker was required to declare and pay out annual profits.

2. That he, and he only, had discretion to fix valuations and estimate profits.

3. That he had performed that duty and exercised that discretion in four several years, 1872, 1873, 1874 and 1875.

4. And that the declared profits had all been distributed and expended.

It is obvious therefore that the creditors represented here come very fully within the observation of Lord Eldon concerning "subsequent creditors." They are "subsequent creditors" with knowledge of a trust power and a discretionary power affecting the firm management. They became creditors knowing what Fred. K. Walker's duties and discretions were, that he had acted repeatedly in their exercise and that the firm books showed what had been done and the exact condition of the firm.

They had the right to demand fullest information as a condition of extending credit. They waived all actual examination and chose to rely on Fred. K. Walker's management rather than trouble themselves with minuter inquiry.

It is claimed by the accountant whom the appellant has introduced as a witness that the firm books showed improper declarations of profits prior to 1875. He professes to trace the mistakes through the books with

somewhat of ease. If such be the fact, the examination was easy to the creditors, for no entry has been changed or mutilated. They were apprised of what had been done and chose to assume that no mistake had been committed.

The will of W. H. Walker devolved upon Fred. K. Walker the management of the posthumous firm, and imposed on him a *trust power* coupled with a *discretionary power*. He was *required*, as has been observed, to ascertain and declare profits annually; he was clothed with discretion to classify assets, estimate their values and fix amount of profits.

Applying to this testamentary provision the rules laid down by Lord Eldon, in *Brown vs. Higgs*, 8 *Vesey*, 569-570, and bearing in mind that the will is the charter of the firm, certain conclusions are inevitable.

The *positive* directions of the testator must be followed. And, therefore, when he imposes a duty to "declare and divide" the profits, the performance of that duty will not be interfered with by the courts. Its performance will be enforced if necessary. Least of all will a Court of Equity set aside such a power, fully executed, on the motion of one who with knowledge of it and knowing its full performance, has become a creditor.

And so too as regards the "discretion" involved in ascertaining profits, valuing assets and rating credits. It will scarce be contended that such a discretion, long since exercised, and fully acquiesced in, *no fraud being charged*, and *good faith appearing*, will now be revised.

And were the discretionary power still unexhausted a Court of Equity would not, in the absence of fraud charged and proved, interfere to control it.

Hill on Trustees, Side page 488 and notes.

Indeed this discretion when once exercised by fixing the values and setting apart the computed profits, cannot be reviewed or the valuations changed even by the trustee.

Perry on Trusts, Sec. 508 ad finem.

The argument *ab inconvenienti* used by Lord Eldon in Ex parte Garland and by Justice Story in Burwell vs. Mandeville's Ex'r, is especially applicable to this case. To sustain the appellant's prayer requires not only the upsetting and recalling of exercised trust powers and discretionary powers; but also—as in the cases referred to—involves the calling back of distributed legacies and devises. This is apparent from the record. When W. H. Walker died two of his eight children had attained their majority. The legacies to them, indicated by clause 6 of his will, have been paid. Since his death two others have reached their majority. These have also been settled with under the same clause.

Now the amount which the appellant prays to have adjudged against the general estate, the legatees and devisees is [Record page 6] - - - -	$77.276 77
To meet this the general estate has only realty, yielding $140 per month, or $1.680 per annum, [Record page 60, questions 56 and 57.] representing, if interest be taken at 4 per cent., a value of not more than - -	42.000 00
Leaving - - - - -	$35.276 77

to be recalled from the legatees and devisees.

It is clear that legacies long since paid (paid before these creditors extended credit,) must be recalled if the appellant succeed. This patent fact must, under the authorities, settle this appeal. It brings it fully within the scope, and almost exactly within the words of the English and American decisions.

Ex parte Garland, 10 Vesey, 119-122.
Ex parte Richardson, 3 Maddox, 79.
McNellie vs. Acton, 4 DeGex, McN. & G., 744.
Cuthbush vs. Cuthbush, 1 Bevan, 184.
Burwell vs. Mandeville's Ex'r, 2 Howard, 560.
Smith vs. Ayer, 101 U. S., (11 Octs.)

The case at bar is thus brought plainly within the line which distinguishes cases of limited partnership *inter vivos* and corporation cases, from those of posthumous partnerships created and managed under testamentary provisions. It is freely admitted that many prece-

dents can be cited of the recall of dividends distributed by corporations, and of larger liabilities being fixed upon limited partners. They have no application, because they proceed upon an entirely different principle of law. They have been repeatedly urged as authority by able counsel but always without success.

The dead man's estate can be embarked in commerce only when his will so declares. For that reason the will becomes, as has been remarked, the charter of the new firm. It controls absolutely the partners and the creditors. There are no rights beyond it, and can be none contravening its provisions. Hence it is that creditors are required to know all that the will contains, and to govern themselves accordingly. They must bear in mind that estates will not be tied up nor distributions delayed for their convenience or protection—and that they cannot be heard to ask a recall of what has been paid out to legatees.

It may be added, in conclusion, that the allegations in complainant's bill that the declaration and distribution of profits diminished the capital, are refuted by the proof.

The firm assets realized even in bankruptcy sales and sacrafices, - - - - - - -	$96.357 90
There was paid on the Gardner & Co. indorsements, after the last declaration of profits [Record page 59,] -	48.800 26
There was paid on other indorsements [Record page 62,] - - - - - - -	26.100 00
The liability on indorsements for Thomas Walston is [Record page 31,] - - - - - -	33.995 97
And F. K. Walker owes [Record page 67, question 63.]	28.220 44
Making assets accounted for - - -	$233.477 57
As against which the entire indebtedness is (including the Walston paper.) [Record page 31,] - -	$232.389 69

Leaving a small surplus, and fully justifying the proof that the losses by Gardner and others caused the insolvency of the firm. But

for those losses the firm assets would have more than paid every demand.

[Record page 60, question 51.]

These losses were incurred after the last declaration of profits. So soon as they began to come in, declarations and distributions of profits were stopped.

It is submitted that the case at bar comes well within a rule so firmly established in England and America as not to be lightly shaken.

An affirmance of the decree of the Circuit Court, dismissing appellant's bill is respectfully asked.

JOHN MASON BROWN,
Counsel for Appellees.